The Central Law Journal.

ST. LOUIS, JANUARY 15, 1892

The decision of the United States Supreme Court, in the Maine railroad tax case, is a departure from, or at least a qualification of previous decisions of that court upon the same subject. The case turned upon the question of the right of the State to tax the gross receipts of a railroad for each mile operated within its limits, regardless of the fact that said road extended into another State, and thus was brought within the purview of the constitution as to interstate commerce. The court decided, however, that the Maine law was constitutional, inasmuch as it provided an excise tax for the privilege of exercising the railroad's franchises within the State. This decision, however, was rendered by a bare majority of the court, Chief Justice Fuller and Justices Gray, Blatchford and Brewer concurring with Mr. Justice Field, who wrote the opinion, and Justices Bradley, Harlan, Lamar and Brown dissenting. The closeness of the division in the court shows that in spite of the attention which has been given by this court to questions involving the regulation of commerce, and the great number of decisions rendered in reference thereto, the subject has been by no means cleared of its difficulties.

The court takes the position that while the character of the tax or its validity is not determined by the mode adopted in fixing its amount, the rule of apportioning the charge to the receipts of the business, as was adopted in this case, would seem to be eminently satisfactory and likely to produce the most satisfactory results both to the State and to the corporation taxed. Upon the main question in the case, namely, the invalidity of the proceeding as an interference with interstate commerce, the court regards the assumption, held by the opponents of the tax, that a reference to the transportation receipts in determing the amount of the tax was in effect the imposition of a tax upon such receipts, as untenable, but that in point of fact the resort to those receipts was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of excise tax which should be levied. In this the court said it was unable to perceive any interference with the regulation of interstate commerce.

The dissenting judges thought that the constitutionality of the tax could not be sustained either on principle or on the strength of previous decisions of the court. While the tax professed to be imposed for the privilege of exercising a franchise within the State of Maine, the mode adopted made it a regulation of interstate and international transportation. If the State had a right to lay a franchise tax upon the corporation, it should do it by a constitutional form of tax, and not by a tax on receipts derived from interstate transportation. In the view of the minority this was in effect a taxation of interstate commerce, which the decisions of the supreme court for a number of years have held to be contrary to the constitution.

It will be noted that the minority of the court regard the receipts of the railway company as forming the subject of the tax, while the majority look upon them as furnishing only a means for determining the amount of the tax. The conclusion of the court seems to be reasonable, inasmuch as a State should be able to tax all of the railroads that have the privilege of doing business within its borders; and the fact that some of them happen to have lines extending into another State should not exempt them from the obligation to pay their due share of the public expenses. It may also be said that the plan of taxing gross receipts by the mile is probably the best that could be adopted. But it is difficult to reconcile this decision with the earlier decisions of the court construing the interstate commerce clause of the constitution. The subject is one of great difficulty, but it is to be hoped that in time a principle will be invoked in this class of cases, the correctness and justice of which will be recognized by all.

We beg to assure the *Railway and Corporation Law Journal* that in the reproduction of its interesting comments on Dodge v. Boston & Providence R. R. Co., as one of our Notes of Recent Decisions, there was no intention "to exercise the right of eminent do-

main without tendering the usual constitutional compensation." It is usually convenient and permissible for the editor, in case of mistakes of this character, to hide behind the printer, but in this instance we have not been able to locate the responsibility. Sufficient to say that the Journal in question should have had credit for the article, and that the failure to give it was somebody's mistake. In the meantime will our good-natured contemporary please accept, in lieu of indemnity for the damage suffered, "the glory of having its observations fathered by so eminent a periodical as the CENTRAL LAW JOURNAL."

NOTES OF RECENT DECISIONS.

LIFE INSURANCE—POLICY PAYABLE TO CHILDREN—ADMINISTRATOR.—In McElwee v. New York Life Ins. Co., the United States Circuit Court, Eastern District of Missouri, holds that where a policy of insurance on the life of a wife is made payable to her children and she dies before any children are born, her executor cannot maintain an action at law for the amount of the insurance. Thayer, J., says:

After an attentive consideration of this case I have concluded that plaintiff is not entitled to recover. By the terms of the policy the company agreed "to pay the sum of the insurance * * * to the children of the insured,[that is, to the children of Mrs. Vail], share and share alike, or their executors, administrators, or assigns," and there was no change made or attempted in the phraseology of the promise during the life-time of the insured. The policy was obviously intended as a provision for such children as might be born of the marriage between Mr. and Mrs. Vail, and for no one else. The promise was to pay to the children; they were the beneficiaries. If Mrs. Vail had contemplated the possibility of death before she had given birth to any children, some provision would probably have been inserted in the policy touching the disposition of the insurance money in that event. What such provision would have been it is impossible to say, and it is useless to indulge in speculation on that subject, as the court is powerless to make a contract for the parties covering that contingency. It can only enforce such a contract as the parties have themselves made. Some stress is laid on the fact that, according to the rule which prevails in some States, Mrs. Vail retained the power, so long as she held the policy, to change the beneficiaries with consent of the insurer. Kerman v. Howard, 23 Wis. 108; Gambs v. Insurance Co., 50 Mo. 47. It is claimed that because she retained such power, her administrator may recover on the policy. I am unable to assent to that proposition. Even if she had a right to change the beneficiary, it was a mere power, to be exercised with the company's consent, and, as the agreed case shows, she never exercised it, or attempted to do so. The existence of such power, even if its existence be conceded, is not sufficient to make the policy a part of her estate, or authorize her administrator to sue thereon. Furthermore, it is said that by taking out the policy for the benefit of her children Mrs. Vail constituted the defendant company a trustee for her children, and, the trust having failed because she died childless, that the fund in the trustee's hands inures to the benefit of her estate, in the same manner that a fund left in trust for a given purpose will inure to the benefit of the donor or his heirs, if for any reason the trust cannot be executed. It is sufficient to say of this contention that, if the principle invoked has any application to the case at bar, it is only applicable to the premiums actually paid up to the time of Mrs. Vail's death, and the interest accumulated thereon; and the remedy is in equity. Mrs. Vail did not place $5,000 in the hands of the defendant company to be held for the benefit of or in trust for her children. She contracted to pay $39.60 quarterly, and up to the time of her death had paid only two quarterly installments. The contract was entered into with the expectation that Mrs. Vail would live many years, and that the premiums paid in the mean time, with accumulated interest, would equal the face of the policy at the end of her expectancy. Under the circumstances, it cannot be maintained, even on the trust theory above outlined, that the defendant is liable to the plaintiff in the sum of $5,000, or in any sum, in a strictly legal proceeding.

TAXATION—ELECTRIC LIGHTING COMPANIES—MANUFACTURING COMPANY—EXEMPTION.—In our last issue we called attention to a late Pennsylvania case holding that an electric company is not a manufacturing company within the law exempting such from taxation. The Supreme Court of New York, in People v. Wemple, has laid down the same doctrine. In that case an electric lighting corporation was incorporated in 1880, under chapter 37, Laws of 1848, relative to the formation of gas-light companies, which companies were, by chapter 512, Laws of 1879, authorized to "use electricity instead of gas." The corporation in question never produced any thing but electricity. It was held that it was not a manufacturing corporation, and as such exempt from taxation. Section 3, chapter 361, Laws of 1881, imposed the tax in question upon "every corporation, * * * except manufacturing corporations;" further providing that such "exception shall not be taken to include gas companies." Chapter 353, Laws of 1889, amended said section 3 by excluding from the exemption "electric or steam-heating, lighting and power companies." It was held that the said amendment of 1889 was not a legislative declaration that electric companies were previously within the exemption. Upon the main proposition

the court cites People v. Knickerbocker Ice Co., 99 N. Y. 182; People v. New York Floating Dry Dock Co., 92 N. Y. 487; Byers v. Franklin Coal Co., 106 Mass. 131; Commonwealth v. United States Electric Light Co., Supreme Court of the United States, June, 1888.

GAMING — FAIR ASSOCIATION — CORPORATIONS—INDICTMENT.—The Kentucky case of Commonwealth v. Pulaski County Agricultural and Mechanical Association, 17 S. W. Rep. 442, decides an important question, to-wit: that a fair association is liable, under Ky. Stat., ch. 47, § 7, for permitting gaming on its fair grounds, although the attention of the court, in its opinion, was directed chiefly to the question whether a corporation may be indicted for an offense which is punishable by fine. The liability of corporations generally is well established, but the real point of the case, which seems to have been ignored by the court, is a new and interesting question.

CORPSE—RIGHT TO POSSESSION OF—MUTILATION OF REMAINS—DAMAGES AGAINST CARRIER FOR DELAY IN DELIVERING CORPSE—MENTAL ANGUISH.—Two courts have recently considered legal rights in connection with a corpse. In Larson v. Chase, 50 N. W. Rep. 238, the Supreme Court of Minnesota decide that the right to the possession of a dead body for the purposes of preservation and burial belongs, in the absence of any testamentary disposition, to the surviving husband or wife or next of kin, and the right of the surviving wife (if living with her husband at the time of his death) is paramount to that of the next of kin.

This right is one which the law recognizes and will protect, and for any infraction of it—such as an unlawful mutilation of the remains—an action for damages will lie. In such an action a recovery may be had for injury to the feelings and mental suffering resulting directly and proximately from the wrongful act, although no actual pecuniary damage is alleged or proven.

In Hale v. Bonner, the Supreme Court of Texas holds that a wife can recover damages for distress of mind occasioned by the negligence of a railroad company in delaying the transportation of her husband's corpse. The court in the latter case predicates its ruling upon the principle upon which recoveries have been repeatedly sustained against telegraph companies for mental suffering occasioned by failure to deliver promptly telegrams announcing the death or mortal illness of near relatives.

In the Minnesota case the court, after entering into the reason of the doctrine that the right to the possession of a dead body belongs to the surviving wife or husband, or next of kin, says:

> The doctrine that a corpse is not property seems to have had its origin in the *dictum* of Lord Coke, (3 Co. Inst. 203), * * * But whatever may have been the rule in England under the ecclesiastical law, and while it may be true still that a dead body is not property in the common commercial sense of that term, yet in this country it is, so far as we know, universally held that those who are entitled to the possession and custody of it for purposes of decent burial have certain legal rights to and in it which the law recognizes and will protect. Indeed, the mere fact that a person has exclusive rights over a body for the purposes of burial leads necessarily to the conclusion that it is his property in the broadest and most general sense of that term, viz., something over which the law accords him exclusive control. But this whole subject is only obscured and confused and by discussing the question whether a corpse is property in the ordinary commercial sense, or whether it has any value as an article of traffic. The important fact is that the custodian of it has a legal right to its possession for the purposes of preservation and burial, and that any interference with that right by mutilating or otherwise disturbing the body is an actionable wrong. And we think it may be safely laid down as a general rule that an injury to any right recognized and protected by the common law will, if the direct and proximate consequence of an actionable wrong, be a subject for compensation.
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> It is also elementary that while the law as a general rule only gives compensation for actual injury, yet, whenever the breach of contract or the invasion of a legal right is established, the law infers some damage, and, if no evidence is given of any particular amount of loss, it declares the right by awarding nominal damages. Every injury imports a damage. Hence the complaint stated a cause of action for at least nominal damages. We think it states more. There has been a great deal of misconception and confusion as to when, if ever, mental suffering, as a distinct element of damage, is a subject for compensation. This has frequently resulted from courts giving a wrong reason for a correct conclusion that in a given case no recovery could be had for mental suffering, placing it on the ground that mental suffering as a distinct element of damage, is never a proper subject of compensation, when the correct ground was that the act complained of was not an infraction of any legal right, and hence not an actionable wrong at all, or else that the mental suffering was not the direct and proximate effect of the wrongful act. Counsel cites the leading case of Lynch v. Knight, 9 H. L. Cas. 577-598. We think he is laboring under the same misconception of the meaning of the language used in that case into which courts have not infrequently fallen. Taking the language in connection with the question actually before the court, that case is not authority for defendant's position. It is unquestionably the law, as

claimed by appellant, that "for the law to furnish redress there must be an act which, under the circumstances, is wrongful; and it must take effect upon the person, the property, or some other legal interest, of the party complaining. Neither one without the other is sufficient." This is but another way of saying that no action for damages will lie for an act which though wrongful, infringed no legal right of the plaintiff, although it may have caused him mental suffering. But, where the wrongful act constitutes an infringement on a legal right, mental suffering may be recovered for, if it is the direct, proximate, and natural result of the wrongful act. It was early settled that substantial damages might be recovered in a class of torts where the only injury suffered is mental,—as for example, an assault without physical contact. So, too, in actions for false imprisonment, where the plaintiff was not touched by the defendant, substantial damages have been recovered, though physically the plaintiff did not suffer any actual detriment. In an action for seduction substantial damages are allowed for mental sufferings, although there be no proof of actual pecuniary damages other than the nominal damages which the law presumes. The same is true in actions for breach of promise of marriage. Wherever the act complained of constitutes a violation of some legal right of the plaintiff, which always, in contemplation of law, causes injury, he is entitled to recover all damages which are the proximate and natural consequence of the wrongful act. That mental suffering and injury to the feelings would be ordinarily the natural and proximate result of knowledge that the remains of a deceased husband had been mutilated is too plain to admit of argument. In Meagher v. Driscoll, 99 Mass. 281, where the defendant entered upon plaintiff's land, and dug up and removed the dead body of his child, it was held that plaintiff might recover compensation for the mental anguish caused thereby. It is true that in that case the court takes occasion to repeat the old saying that a dead body is not property, and makes the gist of the action the trespass upon plaintiff's land; but it would be a reproach to the law if a plaintiff's right to recover for mental anguish resulting from the mutilation or other disturbance of the remains of his dead should be made to depend upon whether in committing the act the defendant also committed a technical trespass upon plaintiff's premises, while every-body's common sense would tell him that the real and substantial wrong was not the trespass on the land, but the indignity to the dead.

NEGLIGENCE—INJURIES—PHYSICAL EXAMINATION OF PARTY.—Upon the subject of the power of court to compel physical examination of party in negligence case—a subject which has of late been much discussed in these columns—the Supreme Court of Indiana, in the case of Pennsylvania Co. v. Newmeyer, wherein they deny such right, say:

Finally, it is contended by the appellant that the circuit court erred in refusing to require the appellee to submit to an examination of his injuries by surgeons appointed by the court for that purpose. The question here presented is one upon which the authorities are not entirely agreed. There are many cases which hold that the court may, in the exercise of a sound discretion, upon seasonable application, require the plaintiff to submit his person to a reasonable examination, by competent physicians and surgeons, when necessary to ascertain the nature, extent, and permanency of his injuries. White v. Railway Co., 61 Wis. 536, 21 N. W. Rep. 524; Railway Co. v. Thul, 29 Kan. 466; Schroeder v. Railroad Co., 47 Iowa, 375. On the other hand, there are numerous authorities holding that, in the absence of a statute upon the subject, the courts do not possess the power to order and compel such examination. Stuart v. Havens, 17 Neb. 211, 22 N. W. Rep. 419; Railroad Co. v. Finlayson, 16 Neb. 578, 20 N. W. Rep. 860; Parker v. Enslow, 102 Ill. 273; Neuman v. Railroad Co. 50 N. Y. Super. Ct. 412; Roberts v. Railroad Co., 29 Hun, 154. It will be seen, from an examination of the authorities above cited, that the question before us is one not free from difficulty, and one upon which eminent jurists entertain widely different views. In the case of Kern v. Bridwell, 119 Ind. 226, 21 N. W. Rep. 664, the power of the court to make and enforce such an order was denied. In the case of Hess v. Lowrey, 122 Ind. 225, 23 N. E. Rep. 156, it was held that an application made by the defendant after the close of the plaintiff's evidence, where no reason was given for the delay, came too late. As no proper application for such an order was made in that case the question as to whether the court possessed the power to make the order did not arise, and what is said upon the subject is *obiter*, and does not possess the force of a binding adjudication. In the case of Railroad Co. v. Brunker (Ind. Sup.), 26 N. E. Rep. 178, it was also held that the application came too late. In the case of Railway Co. v. Botsford, 11 Sup. Ct. Rep. 1000, the sole question presented for the consideration of the Supreme Court of the United States was the question of the legal right and power of the court trying the cause to make and enforce an order compelling the plaintiff to submit to an examination with a view of ascertaining the nature, extent, and permanency of the injuries on account of which damages were sought. After a careful examination of the authorities upon the subject, it was held that the court under the common law did not possess the power and legal right to order and enforce such an examination. In that case Mr. Justice Gray, speaking for the court, said: "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. * * * The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, and especially a woman, to lay bare the body, or to submit to the touch of a stranger, without lawful authority, is an indignity, and assault, and a trespass; and no order of process, commanding such an exposure or submission, was ever known to the common law in the administration of justice between individuals, except in a very small number of cases, based upon special reasons and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country." There is no statute in this State conferring upon the circuit court the power to make such an order as was asked in this case. If such power exists, it is a power that inheres in the court, independent of any statutory provision. It is applicable alike to all, male and female, and is confined to an examination of no particular part of the person. To say that the power rests in the sound discretion of the court does not meet the case, for the real question is as to whether the power exists at all. So far as we

know, the courts of this State have never attempted to exercise such a power, and we are of the opinion that no such power is inherent in the courts. We think the better reason is against the existence of such a right, and, in the absence of some statute upon the subject, we do not think the courts should attempt to compel litigants, against their will, to submit their persons to the examination of strangers for the purpose of furnishing evidence to be used on the trial of a cause. Should such litigants willingly submit, there could be no legal objection to such an examination, and, should he refuse to submit to a reasonable examination, his conduct might possibly be proper matter for comment; but this is quite a different matter from compelling him, against his will, to submit his person to the examination of strangers.

ANIMALS—VICIOUS DOGS — SCIENTER.—In Conway v. Grant, the Supreme Court of Georgia hold that one, who in a city enters the back yard of another through an open gate on lawful business and is bitten by ferocious dogs running loose in the yard, of which he has no notice, has a right of action against the owner if the latter knew that the dogs were accustomed to bite, and nevertheless permitted them to run loose in such yard with the gate of the same standing open. Bleckley, C. J., says:

The only matter of controversy is touching the fault of the plaintiff in exposing himself to attack by entering the premises of the defendant where the dogs were kept. There was an open gate in rear of the premises, and the plaintiff, according to his declaration, was on lawful business. Being in search of employment as a carpenter, and seeing indications that such work was probably carried on in a certain house, he entered the premises for the purpose of making engagement or to work, having no notice or knowledge of the dogs. In this way he became exposed and was bitten. We think a cause of action is substantially set forth. Code, § 2964, declares: "A person who owns or keeps a vicious or dangerous animal of any kind, and, by the careless management of the same, or by allowing the same to go at liberty, another, without fault on his part, is injured thereby, such owner or keeper shall be liable in damages for such injury." The fault here referred to is not that of being a trespasser, but that of being in some way instrumental in provoking or bringing on the attack complained of. "It must, at the same time, be understood that the right of redress of the injured person will be defeated if the injury was caused by his own fault. A person who irritates an animal, and is bitten or kicked in turn, is deemed in law to have consented to the damage sustained, and cannot recover. But if the fault of the injured party had no necessary or natural and usual connection with the injury, operating to produce the injury as cause produces effect, the owner of the animal will be liable. For example, the defendant keeps upon his premises a ferocious dog, and the plaintiff, having no notice that such dog is there, trespasses in the day-time upon the premises, and the dog rushes upon him and bites him. The defendant is liable, since it is not the necessary or natural and usual consequence of a person's trespassing upon a man's premises by day that he should be attacked by a savage dog." Bigelow, Torts, pp. 249, 250. Though the gate was open, and the plaintiff was on lawful business, it may be that he had no strict legal right to enter the premises from the rear. But this would be no justification for leaving dangerous dogs loose on the premises to bite him or others that might so intrude. Such dangerous means of defense against mere trespassers the law will not countenance. As general authorities on the subject, see Brock v. Copeland, 1 Esp. 203; Sarch v. Blackburn, 4 Car. & P. 297; Curtis v. Mills, 5 Car. & P. 489; Loomis v. Terry, 17 Wend. 496; Pierret v. Moller, 3 E. D. Smith, 574; Kelly v. Tilton, 42 N. Y. 263; Sherfey v. Bartley, 4 Sneed, 58; Woolf v. Chalker, 31 Conn. 121; Laverone v. Mangiante, 41 Cal. 138; notes to Knowles v. Mulder, (Mich.) 41 N. W. Rep. 896; Cooley, Torts, *345; Bish. Non-Cont. Law, 1235 *et seq.*; 1 Thomp. Neg. p. 220, § 34; Muller v. McKesson, 73 N. Y. 195; Rider v. White, 65 N. Y. 54. It will be observed that the most that could possibily be said against the plaintiff is that he trespassed by going upon the premises. This is a milder fault than going there to commit a trespass. If his purpose had been to commit a crime, the dogs would have been properly employed in resisting him. But he seems to have had a virtuous and worthy object, although his mode of executing it was doubtless injudicious. It was not lawful to bite him by the instrumentality of dogs or other dangerous animals.

THE USE OF THE WORD "TRUSTEE" AS NOTICE OF AN EXISTING TRUST.

Is the use of the word "trustee" in a draft, bill of exchange, promissory note or other evidence of debt, after the name of the payee, and which instrument is indorsed to a purchaser for value by such payee indorsing his name thereon and either adding or not adding the word "trustee" to his name thus indorsed, sufficient of itself to charge such indorsee with notice of the character in which such trustee holds or controls such instrument and of the terms of trust?

Notes and Mortgages.—The owner of an equity of redemption of land took an assignment of a mortgage, and of the debt secured thereby, to himself as "trustee, and his heirs and assigns." After his death his heirs sold the land, and agreed to deliver a good and sufficient debt, free from incumbrances. It was held that the purchaser was not compelled to accept a deed executed by such heirs, without a discharge of the mortgage, or proof that there was no trust to which the land was subject. In passing on the question the court said: "If it had been a simple assignment, the title thus acquired would have been perfect. But the assignment was to him as "trustee," and the note was also

indorsed to him as "trustee." This is notice that he took the note and mortgage in trust, and raises a presumption that a trust existed. Here, then, is a notice of a trust which need not appear of record; and of such a character that it would not be extinguished by the union of the legal and equitable title to the land in Newell Sturtevant, the indorsee."[1] A lent money held in trust by him for C, and took therefor a note and mortgage of land, the note being payable to A personally, and the mortgage, which was recorded, reciting that the consideration was paid by A, "trustee of C," and conveying the land to A "trustee as aforesaid." A afterwards borrowed money of B and assigned the note and mortgage to him as security therefor; and the assignment of the mortgage was recorded. The note was delivered, but not indorsed, to B; and the words "trustee of C" were erased by A before the mortgage was delivered to B. B did not examine the record, and his attention was not attracted to the words "trustee as aforesaid," and he had no actual knowledge of their existence, or of the fact that both note and mortgage represented trust funds held by A, but he knew that the money lent to A was for personal use. It was held that B was charged with constructive notice of the trust under which A held the note and mortgage. The mortgage was assigned by A, personally, without mentioning his capacity as trustee. "It cannot be doubted that," said the court, "if the defendant had read the mortgage, and become aware of the fact that it was to Lewis as 'trustee aforesaid,' he would have pursued the inquiry as to the meaning of those words. Looking to see what was referred to in the few lines which preceeded them, he would probably have discovered the erasure. If he did not, he would have been likely and also bound to inquire if Lewis held the mortgage as trustee, and trustee for whom."[2]

Another owned bonds which had been deposited with a trust company, and for which a non-negotiable receipt had been issued in the name of her son "as trustee." She delivered the receipt to her son and authorized him to use it for his own benefit with a bank to the extent of $750. He pledged it with the bank to secure a note for $1,650, and received from it obligations of his own amounting to that sum, among which were two upon which his mother was liable, which amounted to $750. She having disaffirmed the agreement tendered to the bank the securities surrendered to her son and demanded a return of the receipt, and on the bank's refusal to comply with the demand brought an action to recover the receipt. It was held that the fact that the son was described in the receipt as a trustee was notice to the bank that he was not the absolute owner of it, and imposed upon it the duty of ascertaining the limits of his authority over it, and of restricting his transactions with them within such limits, and that the mother was entitled to recover. "The fact," said the court, "that the instrument stated Swan to be a trustee, for the benefit certainly of some other person, was sufficient to admonish the defendant that he was incapable of using it for the purpose of adjusting obligations existing against himself."[3]

Bank Deposits.—Money was deposited in bank by "J. C. Wilson, trustee," and it was held that this notice to the bank of the character in which the trust was made. "Wilson," said the court, "had an account with the bank from which the money in question was checked, and he then placed it to another account. The latter was unlike the former in this that it was 'J. C. Wilson, trustee.' The word "trustee" meant something. It was not merely *descriptio personæ*, but was a description of the fund deposited. It imported the existence of a trust and was notice of the character of the fund. Besides it was unusual and out of the ordinary course of business to open two accounts with the same person for the same fund, and this fact coupled with the further fact that it was deposited by him as trustee, and not in the usual way, was sufficient notice that the fund was held in trust."[4] This case also declares that "there is no difference in principle between money held in trust and certificates of stock held in trust. If the word 'trustee' is notice of the character of one, it is also of the other."[5]

Stock.—S brought an action against the bank of Montreal to recover the value of

[1] Sturtevant v. Jaques, 14 Allen (Mass.), 523.
[2] Smith v. Burgess, 133 Mass. 511.
[3] Swan v. Produce Bank, 24 Hun, 277.
[4] Bundy v. Town of Monticello, 84 Ind. 119.
[5] This general doctrine is enforced in Central Nat Bank v. Ins. Co., 14 Otto, 54.

stock in the company under the following circumstances: S's money was originally sent out from England; to J R at Montreal to be invested in Canada for her, J R subscribed for a certain amount of stock in the Montreal Rolling Mills Company, as follows: "J. Rose, in trust," without naming for whom, and paid for it with S's money. He subsequently sent over certificates of stock to S, and paid her the dividends he received on the stock. Being indebted to the bank of Montreal, J R transferred to the managers of the bank as security for his indebtedness, some 350 shares of the Montreal Rolling Mill Company, and the transfer showed on its face that he held these shares "in trust." The bank of Montreal then received the dividends on these shares, credited them to J R, who paid them to S J R, who subsequently became insolvent, and S, not receiving her dividends as usual, sued the bank for an account. It was held that there was sufficient to show that J R was acting as the mandatory agent of S, and the bank of Montreal, not having shown that J R had authority to sell or pledge the said stock, S was entitled to get an account from the bank.[6]

There is little or no difference between the transfer of a note payable to A, "trustee," and a certificate of stock issued to A, "trustee," at least none in the general result of the decisions of the courts. Thus, a certificate of stock was issued to "E. Carter, trustee." In violation of his trust, Carter transferred the stock represented by the certificate as a pledge to a third person, for a valuable and adequate consideration without other notice of any defect in title than such as the law may impute from the word "trustee" in the body of the certificate and after the signature of Carter upon the blank transfer. The transfer in blank on the back of the certificate was subscribed "Edward Carter, trustee." "Unless," said the court, "the word 'trustee' may be regarded as mere *descriptio personæ*, and rejected as a nullity, there was a plain and actual notice of the existence of a trust of some description." Again: "The fact that it is common to issue certificates of stock in the name of one as trustee, when no trust actually exists, has no legal bearing on the decision of the present case. The rules of law are presumed to be known to all men; and they must govern themselves accordingly. The law holds that the insertion of the word 'trustee' after the name of a stockholder does indicate and give notice of a trust. No one is at liberty to disregard such notice and to abstain from inquiry for the reason that a trust is frequently simulated or pretended when it really does not exist. The whole force of this offer of evidence is addressed to the question whether the word 'trustee' alone has any significance and does amount to notice of the existence of a trust. But this has been heretofore decided, and is no longer an open question in this commonwealth."[7]

"The fact that stock certificates issued in the name of one trustee, and by him transferred in blank, are constantly bought and sold in the market without inquiry, is likewise unavailing. A usage to disregard one's legal duty, to be ignorant of a rule of law, and to act as if it did not exist, can have no standing in the courts."[8]

Stock was placed in the name of "John Stille, in trust." It was held that this was sufficient notice to a *bona fide* lender of money upon them to put him upon inquiry. "In the answer, Bridges does not say that he even made any inquiry of Stille on the subject, a circumstance in itself suspicious. One would suppose that any prudent man, when such security were offered to him by a party whose character was so distinctly expressed, would have demanded by what authority he proposed making use of them, and for what purpose, consistent with his duty as trustee, he intended to use the money received from them. Nor would a cautious lender have been satisfied with the mere say so of the trustee. He would, and ought to have applied to the corporation, in order, if practicable, to ascertain from that source who was the true party interested beneficially in them."[9] One Budd allowed a certificate for ten shares of insurance stock

[6] Sweeny v. Bank of Montreal, 12 Canada Sup. Ct. 661.

[7] Shaw v. Spencer, 100 Mass. 382. Approved in Duncan v. Jaudon, 15 Wall. p. 175, and in Gaston v. American Exchange Nat. Bank, 29 N. J. Eq. 98, 102.

[8] Shaw v. Spencer, 100 Mass. 382, 394, s. c., 1 Am. Rep. 115.

[9] Walsh v. Stille, 2 Parson's Cel. Case (Pa.), 17 (1842). An exactly similar case is Duggan v. London, etc. Agency, 19 Ontario Rep. 272, s. c., 30 Amer. & Eng. Corp. Cases, 89.

owned by her, to be issued to one "Lindley Murray, in trust," to enable him to become a director in the company. Subsequently Murray, without authority, transferred the stock to one Munroe to secure money borrowed of him at that time. Munroe noticed the words "in trust" in the certificate, but was told by Murray that he had control of the stock and could transfer it if necessary. It was held that the words "in trust" imposed upon Munroe the duty of ascertaining the authority of Murray to hypothecate the stock, and that Budd was entitled to recover it from him. "There are several adjudications in kindred cases," said the court, "which establish the doctrine, that the words 'in trust' contained in the certificate were notice to all into whose hands the instrument might fall, and, therefore, imposed the obligation to inquire into the authority of the person named as trustee or holding the trust, to sell or hypothecate the subject of the trust."[10]

California and Maryland Decisions.—Two cases in California and one in Maryland hold that the addition of the word "trustee" to the name is no notice to a *bona fide* purchaser.[11] But these cases have not met with favor, at least at the hands of the text-book writers.[12]

When Name of Beneficiary is Given.—The cases are abundant that if the instrument bear on its face the words "A, trustee of B," or "A, executor of B," or "A, guardian of B," that this is ample notice. Upon this point there seems to be no controversy.[13] The rights of a person dealing with a trustee and executor are different upon the same facts brought to his notice, for a person dealing with an executor is often protected when he would not be if dealing with a trustee.[14]

Comment.—It would seem, however, that the use of the word "trustee" alone ought to be enough to put a purchaser on inquiry, because by itself, the certificate expressly declares that the person named holds the stock as trustee; and it is certainly very odd to decide that this is not enough to cause a reasonable man to suspect that the stock is held subject to a trust. A statement of the nature of the trust, or of the name of the beneficiaries, would lessen the extent of the inquiry to be made, but the use of the word "trustee" alone gives the purchaser full notice that there is a trust of some sort, although no definite statement of the nature of the trust is added.[15] Speaking of the California case, a writer says: "In the California case, which I have cited, the court declares that it is a common practice in the community to transfer stock to a trustee, in order to conceal the name of the real owner, because the name if known might affect the market value of the stock. The owner is also enabled, by this means 'to escape assessments on stock of doubtful value,' and to speculate without injury to his credit. The court speaks of these dubious devices of stock speculations with an apparent air of disapproval; but the effect of the decision is, it seems to me, to make their accomplishment easier and more convenient. A purchaser is declared to be entitled to protection in his possession, who has received a stock certificate running in the name of 'Jos. Tilden, trustee,' without making any inquiry into the nature of the trust. The authorities cited in the opinion merely go to prove that 'if the owner of personal property places it in the possession of another, and confers upon him *indicia* of ownership or right of disposal, he is bound by any disposition made of it to one who acquires it without notice, for a valuable consideration, on the faith of such *indicia*.' This is undoubted law; but to hold further, that a transfer of stock to 'Jos. Tilden, trustee,' confers upon said Tilden the usual *indicia* of ownership or right of disposal, seems to me to sanction a very loose and dangerous interpretation of the term trustee."[16]

Failure to Make Inquiry Because it Might Have been Unavailing, No Excuse.—It cannot be successfully claimed that it was unnecessary to make inquiry, because it would have led to no result. "I think," said Sir John

[10] Budd v. Munroe, 18 Hun, 316, cited with approval in Fellows v. Langyor, 91 N. Y. at p. 331.

[11] Brewster v. Sime, 42 Cal. 139; and Thompson v. Toland, 48 Cal. 99; Albert v. Savings Bank, 1 Md. Ch. 407.

[12] Cook on Stockholders, Sec. 473, p. 488; Francis B. Patten in 18 Am. Law Rev. 982.

[13] Pendleton v. Fay, 2 Paige Ch. 202; Fellows v. Langyor, 91 N. Y. 331; Gibson v. Park Nat. Bank, 98 N. Y. p. 94; Bandecroft v. Cousen, 13 Allen, 50; William v. Fullerton, 20 Vt. 346.

[14] Carter v. National Bank of Lewiston, 71 Me. 448.

[15] Lowell on Transfer of Stock, pp. 72, 73.

[16] Francis B. Patten, 18 Am. Law Rev. p. 983.

Romily, "it is impossible to admit the validity of this excuse. I concur in the doctrine of Jones v. Smith, Hare, 55, that a false answer, or a reasonable answer given to an inquiry made, may dispense with the necessity of further inquiry; but I think it impossible beforehand to come to the conclusion that a false answer would have been given which would have precluded the necessity of further inquiry. A more dangerous doctrine could not be laid down, nor one involving a more unsatisfactory inquiry, merely a hypothetical inquiry as to what A would have said if B had said something other than what he did say."[17]

W. W. THORNTON.

Indianapolis, Ind.

[17] Jones v. Williams, 24 Beavan, 62, quoted in Shaw v. Spencer, 100 Mass. p. 390.

BANKS—PAYMENT OF FORGED CHECK—LIABILITY TO DEPOSITOR.

JANIN V. LONDON & SAN FRANCISCO BANK.

Supreme Court of California, November 19, 1891.

1. Where a bank allowed over three months to elapse before it returned to a depositor a forged check drawn on his account and payable to "currency or bearer," that it had paid without requiring the bearer's indorsement or identification, and there was no evidence that the bank could have retrieved its loss if notified of the forgery, the depositor's neglect within a reasonable time after the return of his canceled checks to examine them, and give notice of the forgery, was not a defense to recover the money paid on such check; and hence the bank was not prejudiced by an erroneous instruction to the effect that the depositor was not guilty of negligence in failing to examine the checks and bank-book, and that he became bound to give notice of the forgery only after he had discovered it. Paterson J., dissenting.

2. The jury were properly instructed to find for plaintiff unless defendant was deprived of an opportunity to save itself from loss by his failure to examine the checks and bank-book, and to give notice of the forgery.

DE HAVEN, J.: The plaintiff was a depositor in the bank of defendant, and the controversy in this action grows out of the payment by defendant of a check for $16,700, purporting to have been signed by plaintiff, and for which amount defendant claims that it is entitled to debit the account of plaintiff. The complaint alleges that this check was a forgery. This is denied in the answer; and as another and separate defense is averred, in substance, that the plaintiff is estopped to deny the genuineness of said check, because of his negligence in not examining his balanced pass-book and returned checks, including the one in dispute, within a reasonable time, and giving notice that such check was forged, "by reason of which laches defendant was prevented from tracing out the forger of said check or said signature, if it was a forgery, and proceeding against him, for a period of nearly five months, and until all trace of said forger was lost." The defendant also avers that the account between itself and plaintiff had become a stated one. The check was paid on May 29, 1878, and on September 4, 1878, the defendant returned to plaintiff his pass-book, showing the statement of his account at that date, and that he was charged with the amount of this check, which was also returned to him as one of the vouchers. On December 11, 1878, another statement of plaintiff's account was rendered by defendant, in which appeared the balance shown by the previous account. The evidence also tended to show that plaintiff did not at once examine the check in dispute when it was returned to him with his balanced pass-book on September 4, 1878, nor until some time in the month of December, 1878, and that he first intimated to defendant a doubt of its genuineness about December 28, 1878, but did not give notice that he actually claimed it to be a forgery until February 1, 1879. The verdict of the jury in favor of plaintiff must be deemed, on this appeal, to have conclusively established the fact that the check was a forgery, as there was evidence sufficient to establish such a finding, and it is not claimed that there was any error in the instructions of the court, so far as they relate to that particular point. It is well settled that a bank in receiving ordinary deposits becomes the debtor of the depositor, and its implied contract with him is to discharge this indebtedness by honoring such checks as he may draw upon it, and it is not entitled to debit his account with any payments except such as are made by his order or direction. Crawford v. Bank, 100 N. Y. 50, 2 N. E. Rep. 881; Bank v. Risley, 111 U. S. 125, 4 Sup. Ct. Rep. 322. All unauthorized payments, such as upon forged checks, are therefore made at the peril of the bank, and it is not justified in charging them against the depositor's account unless some negligent act of his in some way contributed to induce such payment in the first instance, or unless by his subsequent conduct in relation to the matter he is upon equitable principles estopped to deny the correctness of such payments. This view of the law cannot be well questioned, and finds abundant support in the decisions of courts. Shipman v. Bank, 126 N. Y. 318, 27 N. E. Rep. 371; Hardy v. Bank, 51 Md. 562; Weinstein v. Bank, 69 Tex. 38, 6 S. W. Rep. 171; Bank v. Morgan, 117 U. S. 96, 6 Sup. Ct. Rep. 657.

It is not claimed in this case that plaintiff was guilty of any prior negligence which induced the defendant to pay the check in dispute, and we are therefore to consider only the one general question, whether, upon the evidence before it, the court committed any error to the prejudice of the defendant in giving or refusing instructions relating to the defense of estoppel, and this we proceed to do. The plaintiff was in no manner

responsible for the action of the defendant in paying the check. In making such payment it parted with its own money, and not that of plaintiff; and the loss consequent thereon was its own, and should not be transferred to the plaintiff, unless, from all the circumstances in the case, it appears reasonably probable that, but for his alleged negligence, the defendant could have protected itself. The defendant has not in fact discharged its indebtedness to plaintiff, and should not be permitted to debit him with any amount as an offset thereto unless it appears that by reason of the negligent conduct of plaintiff it has omitted to take proceedings which it otherwise would and could have taken to indemnify itself from loss. This seems to us clear upon the plainest principles of justice. The balancing of the pass-book in September, and charging the plaintiff therein with the amount of this check, and its return to him at the same time, constituted a statement of the account between himself and the defendant; and it thereupon became the duty of the plaintiff to examine the same within a reasonable time, and give to defendant, without unreasonable delay, notice of any objection which he had to it; and, unless such objection was made within a reasonable time, it became an account stated, and there was imposed upon the plaintiff the burden of showing that the check with which he was debited was a forgery; and, in addition to this, if the circumstances attending the entire transaction were such as to make it reasonably probable that the bank had suffered prejudice by plaintiff's unreasonable acquiescence in the account as stated, he would not be permitted to open the account by proof of its incorrectness.

Upon the trial the court instructed the jury, in substance, that, if they found that the check in dispute was a forged one, they must find for the plaintiff, unless it was shown that plaintiff's failure to examine his checks deprived the defendant of an opportunity to save itself from loss on account of the money paid thereon; and they were further instructed that, if "the plaintiff was guilty of negligence in respect to his treatment of his checks, including the disputed check, after he received them at the September balancing and the December balancing, or by reason of his making the discovery of the forgery, or of the facts which put him on inquiry respecting it some months before he gave any notice to the bank of such discovery, whereby the bank was or may have been injured, they may find for the defendant." So far, this was a correct statement of the law, and, with other instructions given, conveyed to the jury with sufficient clearness the law as we have declared it. But the court also gave the following: "In considering the fact that Mr. Janin's bank-book was balanced, and that the ank's statement of the balance was apparently cquiesced in for a considerable length of time, I instruct you that the plaintiff was under no contract to the bank to examine with diligence his returned checks and bank-book. In contemplation of law, the book was balanced and the checks returned for the protection of the depositor, not for the protection of the bank; and when Mr. Janin failed to examine it, the only consequence was that the burden of proof was shifted. Mr. Janin then became bound to show that the account was wrongly stated. This right he has preserved so long as the claim was not barred by the statute of limitations." This instruction, although supported by the authority of Weisser v. Denison, 10 N. Y. 68, is not, in our opinion, entirely correct, and is in conflict with other instructions referred to. When considered in connection with a portion of another instruction given, to the effect that it "was sufficient to give notice when the forgery was discovered," this clearly implied that plaintiff could not be charged with negligence in not examining his checks within a reasonable time, and that the jury were only to consider whether he was guilty of unreasonable delay in giving notice after he made the examination and discovered the forgery. This is not the true rule. This error, however, will not, in view of the undisputed evidence, justify a reversal of the judgment. Conceding that the plaintiff was guilty of negligence in not earlier examining his checks, discovering the forgery, and giving notice thereof, there is nothing in the evidence from which it can be reasonably inferred that the defendant sustained any loss thereby, or that its position with reference to the check, because of not having earlier notice, was in any manner changed to its disadvantage, and the court would have been justified in so charging the jury. The check was paid on May 29, 1878; and it was not until September 4, 1878, that it was returned to plaintiff. The check was payable to "currency or bearer," and when paid the person who presented it was not identified, or required to indorse it. This case was tried in 1885, and there is nothing in the evidence pointing to the fact that, if notice had been given on the very day the check was returned, the defendant would have been in any better position to discover the forger, or the person who uttered it, or to avail itself of any of the coercive measures known to the law by which to retrieve its loss, than it was at the time it received notice. If plaintiff was negligent, it was not shown that the defendant suffered any damage thereby, and for that reason such negligence cannot be allowed as a defense to plaintiff's right to recover in this action.

There may be some general language in the case of Bank v. Morgan, 117 U. S. 115, 6 Sup. Ct. Rep. 657, which would seem to imply that it is not necessary that the evidence should tend to show that any pecuniary benefit would have accrued to the defendant if reasonable notice had been given it; but this general language is limited by the facts of that case, and the more specific rule which the court announced, viz: "Still further, if the depositor was guilty of negligence in not discovering and giving notice of the fraud of his clerk, then the bank was thereby prejudiced,

because it was thereby prevented from taking steps, by the arrest of the criminal, or by an attachment of his property, or other form of proceeding, to compel restitution." In the case of Continental Nat. Bank v. National Bank, 50 N. Y. 576, cited by appellant, it is said that the arrest and detention of a swindler are powerful means of coercing restoration of property, and that the loss of this means in relying upon the declaration of another would estop such person from denying the truth of the statement upon which reliance was made. But this language is to be considered in connection with the particular facts then before the court, from which it appears that the declaration held to be an estoppel was the direct admission of the genuineness of the check afterwards claimed to be forged, and that, "had the teller of the certifying bank disclaimed the forged certificate and pronounced it a forgery when presented, the holder of the check would have had ample time to arrest the swindler at the Bank of the State of New York before he had received the money on the gold checks, and before he went to the subtreasury with his gold certificates." White v. Bank, 64 N. Y. 322. The distinction between such a case as that and one like this, in which there is nothing in the evidence to indicate that all trace of the forger was not lost before the check in controversy was returned to plaintiff, months after its payment, is a marked one; and in White v. Bank, just cited, what we conceive to be the rule applicable to the facts in this record thus stated: "In the case at bar it is the merest conjecture, with scarcely a possibility to support it, that the defendant, or those from whom it received the bill, could at any time after the transmission of the foreign bill of exchange to Baltimore have taken any effectual measures either for arresting the swindler or reclaiming the bill bought and paid for upon the credit of the bill. Estoppels cannot be based upon mere conjectures, even if a proper foundation is laid for them in other respects." There is nothing in Bank v. Keene, 53 Me. 103, in conflict with this. In that case, and upon its peculiar facts, it was held proper to instruct the jury "that, if the plaintiffs, relying on the defendant's admission, were induced to refrain from obtaining security from Judson by his arrest or by an attachment of his property, and they thereby sustained an injury, then the defendant would be estopped from denying his signature." But, of course, to justify such an instruction, there must be some evidence tending to show the facts upon which it is predicated. In this case the burden of proof to show that it sustained damage or injury by the negligence of plaintiff was upon the defendant, and this it was reqnired to show by evidence having some reasonable tendency to establish such fact. In order to justify the submission of any question of fact to the jury the proof must be sufficient to raise more than a mere conjecture or surmise that the fact is as alleged. It must be such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists, and when the evidence is not sufficient to justify such an inference the court may properly refuse to submit the question to the jury, and in our opinion the evidence in this case was not such as would have warranted the jury in finding as a fact that the delay of plaintiff in giving it notice that the check in question was a forgery, lost to it any rights or remedies which otherwise it might have resorted to, in order to save itself from the loss incurred by its own mistake or negligence in the first instance, and which it now asks the plaintiff to bear, and therefore the error we have pointed out in the instruction of the court was without prejudice to the defendant. Judgment and order affirmed.

NOTE. — The propositions of law laid down by the court in the principal case are well settled and established by long lines of authorities. A bank being bound to know the signature of its customer, pays a forged check at its peril. First Nat. Bank v. State Bank, 22 Neb. 769, 3 Am. St. Rep. 394; Price v. Neale, 3 Burr. 1355; Jenys v. Fawler, 2 Strange, 946; Wilkinson v. Lutwidge, 1 Strange, 648; Barber v. Gingell, 3 Esp. 60; Smith v. Chester, 1 Term Rep. 655; Bass v. Clive, 4 Moore & S. 13; Forster v. Clements, 2 Camp. 17; Smith v. Mercer, 6 Taunt. 76; Young v. Adams, 6 Mass. 157; Markle v. Hatfield, 2 Johns. 455, 3 Am. Dec. 466; Gloucester Bank v. Salem Bank, 17 Mass. 33; Bank of Commerce v. Union Bank, 3 N. Y. 230; Weisser v. Denison, 10 N. Y. 68, 61 Am. Dec. 731; Goddard v. Merchants' Bank, 4 N. Y. 147; National Park Bank v. Fourth National Bank, 46 N. Y. 77, 7 Am. Rep. 310; Bank of the United States v. Bank of Georgia, 10 Wheat. 333; Commercial, etc. Bank v. First National Bank, 30 Md. 11, 96 Am. Dec. 554; First National Bank v. Ricker, 71 Ill. 439, 22 Am. Rep. 104; Bernheimer v. Marshall, 2 Minn. 78, 72 Am. Rep. 79; Levy v. Bank of the United States, 4 Dall. 234; Laborde v. Consolidation Ass'n, 4 Rob. 190, 34 Am. Dec. 517. And a depositor owes no duty to a bank which requires him to examine his bank-book or vouchers with a view to the detection of forgeries of his name. 2 Lawson's Rights, Remedies and Practice, page 931; Weisser v. Denison, 10 N. Y. 68, 61 Am. Dec. 731; Frank v. National Bank, 37 N. Y. Super. Ct. 26; Welsh v. German-American Bank, 73 N. Y. 424, 29 Am. Rep. 175.

He has a right to assume that the bank before paying his checks will ascertain the genuineness of his signature. Welsh v. German-American Bank, *supra*; Salt Springs Bank v. Syracuse Sav. Inst., 62 Barb. 101. In Hardy v. Chesapeake Bank, 51 Md. 562, the court, after stating the well-settled rule that the relation between banker and customer is that of debtor and creditor, and that the money received on deposit becomes the funds of the bank, says: "There is no question of trust, therefore, between the parties. But their relation is purely a legal one, and if the bank pays money on the forged check, no matter under what circumstances of caution or however honest belief in its genuineness, if the depositor himself be free of blame, and has done nothing to mislead the bank, all the loss must be borne by the bank, for it acts at its peril, and pays out its own funds and not those of the depositor. It is in view of this relation of the parties, and of their rights and obligations, that the practice is universally maintained that banks and bankers

are bound to know the signatures of their customers, and that they pay checks purporting to be drawn by them at their peril." See also Mackintosh v. Eliot National Bank, 123 Mass. 393.

Where, however, the loss can be traced to the fault or negligence of the drawer (or holder) it will be fixed upon him. 3 Am. & Eng. Ency. of Law, page 223; De Ferret v. Bank of America, 23 La. Ann. 310; Smith v. Mechanics' Bank, 6 La. Ann. 610; First National Bank v. Ricker, 71 Ill. 439; Hardy v. Chesapeake Bank, *supra;* National Bank v. Bangs, 106 Mass. 441; Rouvant v. San Antonio National Bank, 63 Tex. 610.

In Minnesota it has been held that upon payment of a forged draft, the drawee and holder both being chargeable with negligence, and both acting in good faith, the loss must fall upon the drawee. Bernheimer v. Marshall, 2 Minn. 78. But in Ohio the rule has been laid down that where the parties are equally in fault and money is paid upon mutual mistake of facts in respect to which both were equally bound to require, it may be recovered back. Ellis v. Ohio Life Ins. & Trust Co., 4 Ohio St. 628. The law that a voluntary payment of a check to a *bona fide* holder for value cannot be demanded back, was changed in Pennsylvania by the act of April 5, 1849, and in that State a bank paying money on a forged check can recover it back. 3 Am. & Eng. Ency. of Law, page 224; Tradesmen's National Bank v. Third National Bank, 66 Pa. St. 435; Chambers v. Union National Bank, 78 Pa. St. 205; Corn Exchange Bank v. National Bank, 78 Pa. 233.

But whatever may be said as to the duty of a depositor to examine his checks promptly, it is conceded that when he has discovered the fact that his signature has been forged, or is informed of circumstances which would put him upon inquiry as to the fact, it is his duty to report the matter promptly to the officers of the bank. This proposition of law is conceded by the court in the principal case, but its effect is frustrated by the view of the court that even though the depositor had given notice at the time of the discovery of the forgery, it would not have enabled the bank to save itself. Some, however, will agree with the conclusion of Patterson, J., who dissents in the case, that this question should at least have been allowed to go to the jury. He contends that if the depositor has willfully withheld from the bank any information he may have had, he ought to be estopped from claiming that the bank could not have protected itself. Under the decisions of the majority, a dishonest depositor would be enabled without peril to himself to perpetrate a fraud upon the bank. If he discovers that he has been negligent in examining his checks or in making report to the bank of any discovery of the forgery, he will nevertheless be entitled to recover, unless the bank can show that it was prejudiced by his negligence.

Thus he will know that the longer he withholds notice of the forgery from the bank, the more difficult it will be for the bank to prove that it would have detected and arrested the forger, and therefore the easier it will be for him to recover. This, it seems to the dissenting judge, "is putting a premium upon laches and encouraging a dishonest depositor even to arrest a forger in covering up his tracks. There is no doubt in my mind that Mr. Janin acted in the utmost good faith, but it is a question of fact which should be left to the jury, whether his long delay in giving the bank notice of the forgery did or did not prejudice the bank. The latter was entitled to immediate notice of plaintiff's discovery. And it does not follow that because plaintiff failed to detect the forger the officers of the bank also would have failed to do so. The arrest and detention of a forger is often a strong and effectual means for the restoration of the money."

And although it may be a difficult question to determine in certain cases whether the injured party has been deprived of or delayed in the exercise of this coercive power by the negligence of the depositor, it is for the jury, reasoning to practical results from all the circumstances, to say whether it is fairly probable that the defendant could and would have taken effectual measures to protect itself. Continental National Bank v. National Bank, 50 N. Y. 575; Voorhis v. Olmstead, 66 N. Y. 113; Bank v. Morgan, 117 U. S. 96. It was held in the latter case that the depositor who by neglect to examine his pass-book periodically, sent back the balance from the bank with the canceled paid checks as vouchers, puts it in the power of his clerk to continue a practice of raising checks after their signature and before their presentation by such clerk, must bear the loss resulting. He cannot charge it on the bank. And whether he exercises reasonable care in the premises is a question of fact on the circumstances of each case. The court therein says:

"If the depositor was guilty of negligence in not discovering and giving notice of the fraud of his clerk, then the bank was thereby prejudiced, because it was prevented from taking steps, by the arrest of the criminal, or by an attachment of his property, or other form of proceeding, to compel restitution. It is not necessary that it should be made to appear by evidence that benefit would certainly have accrued to the bank from an attempt to secure payment from the criminal. Whether the depositor is to be held as having ratified what his clerk did, or to have adopted the checks paid by the bank and charged to him, cannot be made, in this action, to depend upon a calculation whether the criminal had at the time the forgeries were committed, or subsequently, property sufficient to meet the demands of the bank. An inquiry as to the damages in money actually sustained by the bank by reason of the neglect of the depositor to give notice of the forgeries might be proper if this were an action by it to recover damages for a violation of his duty; but it is a suit by the depositor, in effect, to falsify a stated account, to the injury of the bank, whose defense is that the depositor has, by his conduct, ratified or adopted the payment of the altered checks, and thereby induced it to forbear taking steps for its protection against the person committing the forgeries. As the right to seek and compel restoration and payment from the person committing the forgeries was in itself a valuable one, it is sufficient if it appears that the bank, by reason of the negligence of the depositor, was prevented from promptly, and, it may be, effectively, exercising it. * * * It seems to us that if the case had been submitted to the jury, and they had found such negligence upon the part of the depositor has precluded him from disputing the correctness of the account rendered by the bank, the verdict could not have been set aside as wholly unsupported by the evidence. In their relations with depositors, banks are held, as they ought to be, to a rigid responsibility; but the principles governing those relations ought not to be so extended as to invite or encourage such negligence by depositors in the examination of bank accounts as is inconsistent with the relations of the parties, or with those established rules and usages sanctioned by business men of ordinary prudence and sagacity, which are, or ought to be, known to depositors." See, also, Hardy v. Bank, 51 Md. 562; Bank v. Keene, 53 Me. 103. When it appears that the

plaintiff's negligence contributed to the injury the question whether the bank was in fact prejudied by the failure of the plaintiff to exercise ordinary care is material and should be left to a jury.

CORRESPONDENCE.

LEGISLATIVE POWER TO ABOLISH GRAND JURY.

In your volume 33, No. 23, Dec. 4, 1891, appears a case: *In re* Wright, 27 Pac. Rep. 565. It seems that the constitution of Wyoming has assumed to authorize the legislature to abolish the grand jury system, and to authorize the trial of one accused of a felony on information, and without indictment. In the case referred to, this power appears not to have been questioned, the discussion is upon the question of *ex post facto* laws, and the length and breadth of the meaning of that term. What appears to be a graver question is the power of a State to dispense with an indictment in a felony case. Has not the State of Wyoming gone beyond its power in this provision? See Constitution of United States, art. 5, amendments; Story on the Constitution, §§ 1782, 1784, 1785. It appears to be true that Wyoming is not alone in this assumption of power to abolish the grand jury. See Cooley's Constitutional Limitations, p. 376. But looking to the whole of article 5, Amendments Const. U. S., there seems to be no room to doubt that the limitation applies to the States as well as to the United States government.

A. A. KEMBLE.

BOOK REVIEWS.

PORTER ON BILLS OF LADING.

Though the subject of this book is embraced in general treatises on Carriers, it is the first American work on the law relating to Bills of Lading exclusively. We agree with the author that the subject is worthy of more extended treatment than is possible in a general treatise.

We know of no better way to indicate its scope than to state succinctly the subjects of the chapters. We have first, definitions of bills of lading, their kind, contents, parties and offices.

Next the author discusses exhaustively the question as to how far a bill of lading is a receipt, when its terms may be varied by parol proof, as to the description of the goods and as to their weight and quantity, and the effect of the qualifying clauses "contents unknown," "weight unknown," etc. Next, the subject of the bill of lading as a contract is considered and following this the right of carriers to limit their common law liability, with especial reference to the doctrine of each State. In the chapter on execution or acceptance of the bill by an agent of the shipper or of the carrier, will be found cited the authorities on the question which arose in the recent case of Friedlander v. Texas Pac. R'y, as to the validity of bills of lading fraudulently issued by an agent, where goods are not actually received. The author adopts the view of the United States Supreme Court as declared in that case relieving the railroad company for liability, though he admits that a contrary rule is established in New York, Pennsylvania, Kansas, Nebraska and England. We have not changed our opinion expressed at the time of the decision in the Friedlander case that the New York rule is the more just (28 Cent. L. J. 493). A number of chapters of the book are devoted to the subject of the exceptions from liability usually expressed in bills of lading—"Act of God" "Accidents of machinery" "barratry" "fire," "freezing," "leakage and breakage," "perils of the sea," "pirates," "rats and vermin," "public enemy," etc. There are chapters on bills of lading for through carriage, liability of intermediate carriers under a "through" bill of lading, stipulations as to demurrage, payment of freight and also relating to delivery.

The question as to how far and in what sense a bill of lading is a muniment of title to the goods is well treated as also its negotiability and transfer. The work concludes with chapters on the bill of lading as collateral security, the bill holder's title and the right of stoppage, in transitu, the uniform bill of lading, its growth and adoption.

The latter subject is of especial and new interest owing to the recent adoption by many of the larger carriers of a uniform bill of lading, the form of which is here set out. A careful examination of the book justifies us in the assertion that it is exceedingly well prepared and quite exhaustive of the authorities. It will no doubt prove a valuable addition to the libraries of those having any interest in its subject.

It is a work of over five hundred pages, well printed and with a first class index. It is published by Kay & Bro., Philadelphia.

QUERIES.

QUERY NO. 1.

A, a railroad company brakeman of a freight train, lays off from work one week, then goes to depot at another section of said railroad from which he had been employed, to get a pass to resume his work. While at said depot he is requested by B, a head brakeman, and the man in charge of a wrecking freight train of said railroad company, to assist in swiching, there being but two men of the railroad company to switch said train, when three were necessary. A complies with the request of B and is injured. Is the railroad company liable for A's injuries? Cite authorities.

C.

QUERY NO. 2.

A borrowed $300 of B on a note on which C was his surety. To indemnify C, A gave him a chattel mortgage on property owned by him. At the maturity of this note A borrowed $300 of D, and gave his note to him for that amount with C as his surety, and with the proceeds of this loan paid the debt due B. When this second note matured A borrowed $200 of E, with C and B as sureties, and paid D's claim. While the first note mentioned was unpaid, A mortgaged the same property to F to secure a debt, representing that the property was free of liens and incumbrances, F having no actual knowledge of the mortgage to C. On a foreclosure of the mortgage given F, will the mortgage given C be held yet alive and superior to the lien of the mortgage given F, on the ground that the second and third notes were renewals of the first? Cite authorities, *pro* and *con*, if any.

J. M. U.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ADMINISTRATION—Appointment of Administrator.—By section 177, ch. 23, Comp. St., jurisdiction is conferred upon the county court of the county where the deceased person was a resident at the time of his death to grant letters of administration. Where the deceased was a non-resident of the State, leaving property in this State to be administered, an administrator may be appointed, in a proper case, by the county court of any county in which there is an estate to be administered.—*Moore's Estate v. Moore*; Neb., 50 N. W. Rep. 443.

2. ADMINISTRATION — Failure to Present Claim.—A creditor having a claim against the estate of a deceased person is barred of his right to recover against the heir, if he neglects to present his claim for allowance in the course of probate proceedings.—*Hill v. Nichols*, Minn., 50 N. W. Rep. 367.

3. ADMINISTRATION — Laches.—In the application of the doctrine of laches, where rights of *cestui que trust* are involved, and the trustee is charged with fraud, the latitude extended in favor of the *cestui que trust* is very much more liberal than in other cases where the same defense is relied upon.—*Bechtold v. Read*, N. J., 22 Atl. Rep. 1085.

4. ADMINISTRATION — Limitations.—Where the only evidence in support of a wife's claim against her husband's estate is that she handed him a sum of money more than five years before her claim was filed in the probate court, the claim is barred by the statute of limitations.—*Bromwell v. Schubert*, Ill., 28 N. E. Rep. 1057.

5. ADMINISTRATION — Sale — Validity.—Defendant, as administratrix, sold the real estate belonging to her husband's estate, and before confirmation thereof purchased the same in her own right: *Held*, that the sale was void as to all minor heirs, but only voidable as to heirs having ability to object.—*Gibson v. Herriott*, Ark., 17 S. W. ep. 589.

6. ADMINISTRATOR'S BOND—Liability of Sureties.—The death of an administrator of an unsettled estate does not start the running of the statute of limitations in favor of sureties on his administration bond, since the liability of the deceased administrator is not fixed until the decree of the court approving the final account submitted by his administrator, and the statute does not begin to run until the rendition of such degree.—*Williams v. State*, Miss., 10 South. Rep. 52.

7. ADMIRALTY—Seaman—Exemption of Wages.—Rev. St. U. S. § 4536, providing that "no wages due or accruing to any seaman or apprentice shall be subject to attachment or arrestment," does not apply where an execution, issued in an action against a person claiming to be a seaman, is served upon the owners of the vessel, and payment is enforced from them by an order made in proceedings supplemental to execution. — *Telles v. Lynde*, U. S. D. C. (Cal.), 47 Fed. Rep. 912.

8. ADVERSE POSSESSION—Instruction.—In ejectment against a husband and wife plaintiff claimed the land under a sheriff's deed given on the sale of the land under execution, issued on a judgment against the husband. The defendants had no "paper title" to the land, but the plaintiff's evidence tended to prove that prior to the sheriff's sale the title was in the husband by prescription. The defendants claim that the title was in the wife by purchase: *Held* that, as the plaintiff's title depended wholly upon the husband's title by prescription, the court properly instructed the jury that if they found that the husband and his family "occupied, used, and held actual, continuous, adverse, and exclusive possession since 1859" under a claim of title in the husband, the plaintiff could recover.—*Johnson v. Turner*, Md., 22 Atl. Rep. 1103.

9. ADOPTION—Annulling Decree.—A decree of adoption, made by the probate court on petition of a person of unsound mind, which was procured by the person adopted by means of fraud and undue influence, and by concealment of such mental unsoundness from the court, may, after the death of the petitioner, be annulled on the application on the next of kin, who were out of the State at the time of the adoption proceedings, and had no knowledge of petitioner's mental unsoundness until after her death.—*Tucker v. Fisk*, Mass., 28 N. E. Rep. 1051.

10. APPEAL—Bill of Exceptions.—In Indiana the stenographer's report of the testimony given at a trial cannot be made a part of the bill of exceptions merely by a reference, but it must be incorporated into the bill of exceptions.—*Morningstar v. Musser*, Ind., 28 N. E. Rep. 1119.

11. APPEAL—Confession.—Where, on writ of error, the defendant pleads that the writ was not prosecuted within the time limited by the statute, which plaintiff denies, and defendant demurs thereto, this is a confession of the error, and the decree must be reversed.—*Mahoney v. Keane*, Ill., 28 N. E. Rep. 915.

12. APPEAL—Construction of Statutes.—A statutory right to have cases reviewed on appeal may be taken away by a repeal of the statute, even as to cause

which have been previously appealed.—*Callahan v. Jennings*, Colo., 27 Pac. Rep. 1055.

13. APPEAL—Review.—Where, in an action tried by the court without a jury, no propositions of law are asked by counsel, and the rulings of the court upon the admission of evidence are not assigned as error, there remains no question for the determination of the supreme court, since upon controverted questions of fact the decision of the Illinois appellate court is final.—*St. Louis & C. R. Co. v. East St. Louis & C. Ry. Co.*, Ill., 28 N. E. Rep. 1088.

14. APPEAL—Sufficiency of Evidence.—Whenever an appellate court conscientiously and irresistibly reaches the conclusion that a verdict is against the truth and the undoubted weight of the submitted evidence, and could only have been reached by the failure on the part of the jury to exercise an unbiased and unprejudiced judgment, such order should unhesitatingly reverse the order of the trial court refusing to vacate such verdict.—*Fuller v. Northern Pac. Elevator Co.*, N. Dak., 50 N. W. Rep. 359.

15. APPEAL FROM JUSTICE'S COURT — Transcript.—Where a transcript of a judgment rendered in a justice court is filed by either party in the district court within 30 days from the date of the judgment, the appellate court will thereby acquire jurisdiction of the case, although the transcript is not full and complete.—*Fulton v. Ryan*, Neb., 50 N. W. Rep. 430.

16. ASSAULT—Injury.—Where, in a civil action for assault, it appeared that the parties were in shool, and defendant kicked plaintiff on the leg, during school hours, and caused the injury, though defendant may not have intended to injure plaintiff, the act being unlawful, defendant was liable.—*Vosburg v. Putney*, Wis., 50 N. W. Rep. 403.

17. ASSIGNMENT FOR BENEFIT OF CREDITORS.—An instrument that does not purport to be made by an insolvent debtor, and to convey all the debtor's property not by law exempt, does not constitute an assignment under the statute of this State providing for assignments by insolvent debtors.—*Sandmeyer v. Dakota Fire & Marine Ins. Co.*, S. Dak., 50 N. W. Rep. 353.

18. ASSIGNMENT FOR BENEFIT OF CREDITORS—Partnership—Married Woman.—Where a married woman attempts to make a contract of partnership which is invalid in Texas, her husband becomes a partner, as to the firm's creditors; and when he joined his wife and other members of the firm in an assignment for the benefit of the firm's creditors of "all their property, real, personal, mixed, partnership, separate, and community," the conveyance was a sufficient assignment of the firm's property, in the absence of proof that it was composed in part of the wife's separate estate, notwithstanding that the husband joined under the mistaken belief that he was a necessary party to convey his wife's supposed interest.—*Purdom v. Boyd*, Tex., 17 S. W. Rep. 606.

19. ATTACHMENT — Affidavit of Non-residence.—The words "not a resident of the State" and "a non-resident of the State" mean the same thing, and, where an affidavit for an attachment shows that the defendant is a non-resident of the State, no undertaking is necessary.—*Nagel v. Loomis*, Neb., 50 N. W. Rep. 441.

20. ATTACHMENT—Judgment.—A judgment by default against defendant in an attachment suit is not, as against persons claiming to have bought the goods from them, *prima facie* evidence that the sale to claimants was fraudulent.—*Ott v. Smith*, Miss., 10 South. Rep. 70.

21. ATTACHMENT—Priority.—The bank of V located at V, in Saunders county, received $1,785, from D, and issued to him a certificate of deposit, signed by S, the president. Afterwards the bank stopped payment, when D began an action against the bank in Butler county, and caused an attachment to be levied on certain personal property of S. On the next day one B begun an action by attachment against S in Saunders county, and the same was levied on the property previously levied upon in favor of D: *Held*, that the attachment of B constituted the first lien on the property.—*Bauer v. Deane*, Neb., 50 N. W. Rep. 431.

22. ATTORNEYS — County Judge Practicing. — Under Rev. St. Ill. ch. 13, § 10, which declares that no judge of any court of record shall be permitted to practice as an attorney in the court in which he presides, a county judge is not necessarily disqualified from practicing as an attorney in the county court of another county, even though he has presided in that court in particular cases at the request of the judge of such other county.—*O'Hare v. Chicago, M. & N. R. Co.*, Ill., 28 N. E. Rep. 923.

23. BAILMENT — Liability.—Upon the facts, *held* that plaintiff was a bailee for hire, and it was his duty, so long as he retained possession of the cattle, to take such care of them as a reasonably prudent man would of his own cattle, and was liable to defendant if they were improperly fed.—*Cloyd v. Steiger*, Ill. 28 N. E. Rep. 987.

24. BANK CHECK—Acceptance by Telegram.—One T, having purchased certain cattle for $22,000 offered his check in payment. The seller refused to accept it or part with the cattle until assured it would be paid, and therefore telegraphed the drawee, asking if it would pay T's check for $22,000." The drawee answered: "T is good. Send on your paper:" *Held*, that this was an acceptance in writing, within the meaning of Rev. St. Mo., § 533, providing that no person shall be charged as an acceptor of a bill of exchange unless his acceptance shall be in writing.—*Garrettson v. North Atchison Bank*, U. S. C. C. (Mo.), 47 Fed. Rep. 867.

25. BASTARDY—Judgment.—A personal judgment rendered in a bastardy proceeding against a defendant, who has not been arrested and upon whom no process has been served, except by publication, is void.—*Moyer v. Bucks*, Ind., 28 N. E. Rep. 992.

26. BASTARDY—Release of Father.—A voluntary release executed by the mother of a bastard child in favor of the putative father, *held*, not an absolute bar to proceedings against him under the statute (Gen. St. ch. 17) for an order of filiation, and to compel him to provide for the maintenance of the child, and to indemnify the county for expenses incurred or to be incurred therefor.—*State v. Dongher*, Minn., 50 N. W. Rep. 475.

27. BENEVOLENT ASSOCIATIONS — Benefit Certificate. —The by-laws of a charitable association, organized to establish a relief fund for the benefit of its members, provided that on satisfactory proof of a member's death the person or persons designated by such member "related to" or dependent upon him should be entitled to the sum named in his certificate of membership: *Held*, that the phrase "related to" properly includes the wife of a member's grand nephew, though she was neither related to the member by blood, nor dependent upon him.—*Bennett v. Van Riper* N. J., 22 Atl. Rep. 1055.

28. CARRIERS — Stoppage in Transitu.—In an action against a carrier for goods received, but returned by order of the consignor, it appeared that the bill of lading was sent to T Bros. & Co., consignees, and by them transferred to plaintiff for value: *Held* that, though T Bros. & Co. were insolvent, their transfer to plaintiff defeated the consignor's right of stoppage *in transitu*.—*Missouri Pac. Ry. Co. v. Heidenheimer*, Tex., 17 S. W. Rep. 608.

29. CARRIERS OF PASSENGERS — Defective Ticket.—Upon the facts, *held* that the passenger was not restricted to *assumpsit* for the breach of contract, but might sue the company in tort for damages.—*Pouilin v. Canadian Pac. Ry. Co.*, U. S. C. C. (Mich.), 47 Fed. Rep. 858.

30. CARRIERS OF PASSENGERS—Pleading.—A declaration, sounding in tort, against a railroad company for violation of its duty as a common carrier, is not amendable by converting it, in whole or in part, into an action upon contract to carry.—*Cox v. Richmond & D. R. Co.*, Ga., 13 S. E. Rep. 827.

31. CHATTEL MORTGAGE—Bona Fides.—One not a subsequent purchaser or mortgagee, or a creditor who has laid hold of mortgaged personal property, cannot ob-

ject that the mortgage was not executed in good faith. —*Howe v. Cochran*, Minn., 50 N. W. Rep. 868.

32. CHATTEL MORTGAGE—Payment.—A debt evidenced by a promissory note, and secured by a chattel mortgage, is not shown to be paid, so as to satisfy and cancel the mortgage, by part payment in cash, and a note for the balance of the debt, in the absence of an agreement that the new note was received as full payment.—*Hanson v. Tarbox*, Minn., 50 N. W. Rep. 474.

33. CHATTEL MORTGAGE — Possession. — A mortgage was given on a stock of goods, including "all debts and accounts arising from sales thereof." The mortgagors remained in possession, replenished the stock, and sold for cash and on credit: *Held*, that the mortgagors' possession was as agents of the mortgagees.—*Feiner v. Wilson*, Ark., 17 S. W. Rep. 587.

34. CHATTEL MORTGAGE — Record.—An unrecorded mortgage upon chattels, unaccompanied by any change of possession, will prevail over a subsequent mortgage given to secure a prior indebtedness without change of its form or the surrender of any security, provided the earlier mortgage was not kept from the record or the chattels left in the possession of the mortgagor for any improper or fraudulent purpose.—*Milton v. Boyd*, N. J., 22 Atl. Rep. 1078.

35. CHATTEL MORTGAGE—Record.—Under our statute, when a chattel mortgage has not been filed, a presumption of fraud is created from the retention of possession of the mortgaged property by the mortgagor, which may be rebutted by showing that it was made in good faith, and for a valuable consideration.—*Marks v. Miller*, Oreg., 28 Pac. Rep. 14.

36. CHINESE EXCLUSION ACT.—A Chinaman who acquired a domicile in Canada before coming into the United States must be returned to that country, and not to China.—*United States v. Chong Sam*, U. S. D. C. (Mich.), 47 Fed. Rep. 878.

37. COLLECTION OF TAXES.—The imposition and collection of taxes are matters for legislative regulation, and ordinarily the courts will not resort to extralegislative modes of levying or collecting taxes, except in cases where, for the purpose of administering justice, they have interfered with the operation of the legislative scheme.—*State v. State Board of Assessors*, N. J., 22 Atl. Rep. 1085.

38. CONSTITUTIONAL LAW — Appropriations—"Worlds Fair."—Act Leg. Cal. March 6, 1891, providing for the appointment by the governor of a commission to control the expenditure of all moneys appropriated by the State for constructing buildings and collecting and maintaining an exhibit of the products of the State at the World's Fair is not unconstitutional as conflicting with Const. Cal. art. 4, § 22, which declares that no money shall ever be appropriated for the use or benefit of any institution not controlled by the State, since it appears from the act itself, that the appropriation is to be expended by the State itself, and used for State purposes.—*Daggett v. Colgan*, Cal., 28 Pac. Rep. 51.

39. CONSTITUTIONAL LAW — Fish Culture.—St. Mass. 1889, ch. 383, which provides that land in Barnstable county may be flowed for the purpose of fish culture, is not unconstitutional as authorizing the taking of private property for public use.—*Turner v. Nye*, Mass., 28 N. E. Rep. 1048.

40. CONSTITUTIONAL LAW—Municipal Control of Cemeteries.—The ownership of a lot in a cemetery, or license to inter therein, is subject to the police power of the State, and interments may be forbiden, and bodies already interred removed by ordinance of the city.—*Humphrey v. Board of Trustees*, N. Car., 13 S. E. Rep. 793.

41. CONSTITUTIONAL LAW — Interstate Commerce — Peddler.—Merchants engaged in business in Kansas employed citizens of that State as agents to solicit purchases in Missouri. Such agents were furnished with samples of the goods to be sold, and sent the orders obtained by them to their employers, who thereupon shipped to the agents the goods ordered, and the agents delivered them to the purchasers. One such agent, however, offered to sell and deliver to one person, and did sell to another, a single article, one of his samples, and delivered it immediately to the purchaser, without taking an order therefor on his employers: *Held*, that this did not constitute him a peddler, within the statute of Missouri declaring "whoever shall deal in the selling of" goods, with certain exceptions, "by going from place to place to sell the same," to be a peddler, and making punishable such peddling without a license; and that his arrest and imprisonment for violation of that statute were in contravention of Const. U. S. art. 1, § 8, cl. 3, giving to congress alone the power to regulate commerce among the several States.—*In re Houston*, U. S. C. C. (Mo.), 47 Fed. Rep. 539.

42. CONSTITUTIONAL LAW—Legislative Powers.—Where an act of legislature appropriating money to an individual for services rendered the State is valid on its face, courts cannot look into evidence *aliunde* to determine whether it was a gift in violation of Const. Cal. art. 4, § 31, providing that the legislature shall have no power to make any gift ot any public money.—*Stevenson v. Colgan*, Cal., 27 Pac. Rep. 1089.

43. CONSTITUTIONAL LAW — Police Courts. — Const. Wash. art. 11, § 10, which authorizes cities of 20,000 inhabitants to form charters for their own government, but subjects them to the general laws of the State does not authorize them to create a police court.—*In re Cloherty*, Wash., 27 Pac. Rep. 1064.

44. CORPORATIONS—Appointment of Agents.—Act Ala. Feb. 28, 1887, provides that no foreign corporation shall do business within the State unless it has a known place of business therein, and agent thereat, and makes it a penal offense for any agent of such corporation, which has not complied with the act, to act as agent for such corporation: *Held*, that to bring an agent within the inhibition of the statute the act of agency must be done within the State.—*Collier v. Davis*, Ala., 10 South. Rep. 86.

45. COUNTIES—Issue of Bonds.—Where bonds are issued by a court at different times, to pay for improvements, under an act limiting the total amount to be issued, the fact that bonds are issued beyond the limit does not invalidate such bonds as were issued and sold before the limit was reached.—*Caton v. Lafayette County*, Mo., 17 S. W. Rep. 577.

46. COUNTY ELECTION—Jurisdiction.—Under the act of 1885 the county judge, sitting in term time in his regular capacity as the county court, is invested with jurisdiction to try and determine contested election cases of county officers. Whether the county judge sitting in vacation may exercise such jurisdiction, not determined.—*Vailes v. Brown*, Colo., 27 Pac. Rep. 945.

47. COURT—Jurisdiction.—The fact that a party, after his objection to the jurisdiction of a court has been overruled, proceeds to try the cause, does not preclude him from thereafter questioning the jurisdiction.—*Arroyo Ditch & Water Co. v. Superior Court*, Cal., 28 Pac. Rep. 54.

48. COVENANTS RUNNING WITH THE LAND.— Defendant's ancestor conveyed a right to flow a parcel of his land, which was exercised for more than 20 years. Defendants afterwards deeded the land to plaintiff's wife, with covenants of title free from incumbrances, who, after two years' occupancy, sold the land, and afterwards, by a succession of deeds, it was purchased by plaintiff: *Held*, in an action for breach of covenant, that the covenants to plaintiff's wife were broken at once, but the right to sue did not pass to her grantee.—*Smith v. Richards*, Mass., 28 N. E. Rep. 1132.

49. CRIMINAL EVIDENCE—Assault.—In a trial for assault with intent to kill, where defendant claims that he acted in self-defense, he may testify as to threats made by the prosecuting witness, and as to assaults made by him on other persons. The State in rebuttal may show the general reputation of the prosecuting witness for peaceableness.—*Bowlus v. State*, Ind., 28 N. E. Rep. 1115.

50. CRIMINAL EVIDENCE — Burglary. — Unexplained possession of the fruits of a burglary, immediately on

soon after the crime was committed, is presumptive evidence of the guilt of the person having such possession.—*Magee v. People*, Ill., 28 N. E. Rep. 1077.

51. CRIMINAL EVIDENCE—Homicide. — Defendant offered to prove that several hours before the homicide alleged in the indictment he had a difficulty with one K, in which K sought to shoot him in the back with a pistol: *Held*, that this testimony was irrelevant without evidence that defendant mistook deceased for K.—*Sherar v. State*, Tex., 17 S. W. Rep. 621.

52. CRIMINAL EVIDENCE—Murder.—Upon a trial for murder of a girl in an attempt to kill her father, it is reversible error to refuse to allow the defendant to show that, on the day before the homicide, the girl's father armed himself and went to defendant's house with the avowed purpose of killing him while the defendant was concealed in the house, since such evidence is admissible as affecting the extent of the punishment to be inflicted.—*Nowacryk v. People*, Ill., 28 N. E. Rep. 961.

53. CRIMINAL LAW—Arrest.—Rev. St. Ill. ch. 38, div. 6, § 4, which authorizes arrests without warrant in certain cases, is not in conflict with Const. Ill. art. 2, § 6, which provides that no warrant shall issue without probable cause supported by affidavit; nor with section 2, *Id.*, which provides that no person shall be deprived of life, liberty, or property without due process of law.—*North v. People*, Ill., 28 N. E. Rep. 967.

54. CRIMINAL LAW—Burglary — Larceny. — A person who, having entered any building under such circumstances as to constitute burglary in any degree, commits the crime of larceny therein, is punishable therefor as well as for the burglary, and may be prosecuted for each crime separately.—*State v. Hackett*, Minn., 50 N. W. Rep. 472.

55. CRIMINAL LAW—Trial—Election.—A motion to require the prosecuting attorney to elect for what particular offense he will seek to convict is premature when made before it has been clearly shown by the evidence that more than one distinct offense of the kind charged has been committed by the defendant.—*Squires v. State*, Ind., 28 N. E. Rep. 708.

56. CRIMINAL LAW — Embezzlement — Deposit with Master.—Where a clerk deposits money with his employer to be held as security for the faithful discharge of his duties, the employer's failure to return the money does not constitute embezzlement, since the deposit creates a debt, and not a trust.—*Mulford v. People*, Ill., 28 N. E. Rep. 1096.

57. CRIMINAL LAW—Larceny.—A person obtains possession of a horse with the consent of the owner by falsely and fraudulently pretending that he wants to use him a short time for a temporary purpose, and will return him to the owner at a specified time, when in fact he intends to and does wholly deprive the owner of the horse and appropriates him to his own use, there is such a taking and carrying away as to constitute the offense of grand larceny.—*State v. Woodruff*, Kan., 27 Pac. Rep. 842.

58. CRIMINAL PRACTICE—Burglary.—An indictment for burglary, which charges that defendant "feloniously, without force, did enter into the engine-room, [of a railroad company,] the door of said engine-room being then and there open, with intent to steal," etc., is defective, as "engine room" is not within the meaning of "other buildings," mentioned in Crim. Code Ill. § 36.—*Kincaid v. People*, Ill., 28 N. E. Rep. 1060.

59. CRIMINAL PRACTICE—Information.—Under Const. Cal. art. 1, § 8, and Pen. Code Cal. § 1165, one who has been examined and committed on the charge of grand larceny may, after a trial and disagreement, by direction of the court be charged by a new information with embezzlement, without any new examination and commitment, if the evidence taken on the first examination justifies an information for embezzlement.—*Ex parte Nicholas*, Cal., 28 Pac. Rep. 47.

60. CRIMINAL PRACTICE — Jurisdiction— Abduction.—One charged with grand larceny cannot question the jurisdiction of the court on the ground that his arrest within the State was effected by means of his abduction from another State, although it was done by the deputy sheriff and others, acting on the advice of the prosecuting attorney.—*Kingen v. Kelley*, Wyom., 28 Pac. Rep. 36.

61. CRIMINAL PRACTICE—Keeping Disorderly House.—Under an indictment which charges a continuing offense of keeping a house of ill fame, resorted to for the purposes of prostitution by divers persons to the grand jury unknown, the State's failure to prove that the names of such persons were unknown to the grand jury will not invalidate a conviction on the ground that defendant is not protected from a second prosecution for the same offense.—*Dutton v. State*, Ind., 28 N. E. Rep. 995.

62. CRIMINAL PRACTICE—Larceny.—An indictment for larceny from the person which charges that the defendant "did wrongfully and fraudulently and privately take from the person of one C. A. Dunwoody, Jr., and without the knowledge of the said Dunwoody, with intent to steal the same, one watch and chain of the value of seventy-five dollars, and the property of the said Dunwoody," is sufficiently specific in the description of the property stolen.—*Powell v. State*, Ga., 13 S. E. Rep. 829.

63. CRIMINAL TRESPASS—Killing Dog.— The Indiana dog law, passed March 7, 1883, which makes it a misdemeanor maliciously to injure or kill any dog that has been duly listed for taxation, does not render Rev. St. Ind. 1881, § 1955, which provides a punishment for malicious trespass, inapplicable to the malicious killing of an unlisted dog belonging to another.—*Sossi v. State*, Ind., 28 N. E. Rep. 1017.

64. CRIMINAL TRIAL.—Const. Wash. art. 1, § 22, provides that in criminal cases defendants shall have a speedy, public trial by an impartial jury; and Code Wash. § 221, subd. 5, provides that the parties for their counsel may address the court and jury on the law and the facts of the case: *Held*, that the argument and reading of authorities to the court on requests to charge are not such a part of the trial as to be within the spirit of these provisions, and it is in the discretion of the trial judge to exclude the jury at such time.—*State v. Coella*, Wash., 28 Pac. Rep. 28.

65. CRIMINAL TRIAL—Conduct—Waiver.—As a general rule, the failure of opposing counsel to interpose objection, when improper language or argument is being used in addressing the jury, will be treated by the supreme court as a waiver of the objection.—*Klink v. People*, Colo., 27 Pac. Rep. 1062.

66. DAMAGES—Penalties and Liquidated Damages.—A contract stipulated that defendants would make plaintiff superintendent of their market, and in consideration of his services give him certain privileges and a salary. Plaintiff agreed to perform certain duties on his part: *Held*, that a provision that for the performance of "all and every" of the stipulations the parties bound themselves, each unto the other, in the sum of $200 as liquidated damages, should be construed to mean a penalty.—*Wilhelm v. Eaves*, Oreg., 27 Pac. Rep. 1053.

67. DEATH BY WRONGFUL ACT—Constitutional Law.—The provision of Gen. St. Ky. ch. 57, § 4, which gives a right of action to the representatives of one not in the employment of the railroad company, who shall lose his life through the negligence or carelessness of the operators of such railroad, does not render the section unconstitutional, as authorizing such an action against railroads alone.—*Louisville Safety Vault & Trust Co. v. Louisville & N. R. Co.*, Ky., 17 S. W. Rep. 567.

68. DEED—Cancellation — Fraud.—A conveyance by defendant, an aged woman, while very sick, to plaintiffs, who had been for years her confidential advisers in business affairs, by which she conveyed to them all her property to collect rents, etc., and out of the proceeds to keep the property in repair, pay taxes, etc., and pay the residue to defendant during her life, and at her death the remainder to be divided between them, will be set aside where plaintiffs' statements to

defendant, at the time of making the instrument, as to the effect thereof, were that, as proposed by her, in consideration of the instrument, they were to support her during her life.—*Kyle v. Perdue*, Ala., 10 South. Rep. 103.

69. DEED—Coal Land.—As a conveyance of "all the merchantable coal" under the surface of certain land, "to have and to hold the coal in and under said land unto said party of the second part, its successors or assigns, until the exhaustion thereof," is a grant in fee-simple of all such coal, and of the space occupied by it, the grantee has the right to carry through a chamber, or tunnel cut in the same, other coal dug out of an adjacent mine, for the purpose of taking it out through an opening in land of his own.—*Lillibridge v. Lackawanna Coal Co.*, Penn., 22 Atl. Rep. 1035.

70. DEED—Delivery.—A person by executing a deed to his intended wife, and leaving it with his attorney, with instructions to deliver it to the wife as soon as the marriage is solemnized, does not thereby relinquish all dominion over it, but merely leaves it in the hands of an agent, whose possession, so long as it continues, is the possession of the principal; and where the attorney fails to deliver it to the wife, but returns it to the grantor, who himself delivers it after the marriage, the latter delivery is the only one by which the conveyance becomes effectual.—*Barrows v. Barrows*, Ill., 28 N. E. Rep. 983.

71. DEED—Execution.—For the purpose of admitting to record a deed executed in another State, the attestation of a commissioner of deeds for Georgia, in that State, is sufficient, without a certificate verifying his identity and official character; and that printed words describing him were erased, and the same words interlined in their proper place, without explanation of the erasure, will not vitiate the attestation.—*Hadden v. Larned*, Ga., 13 S. E. Rep. 806.

72. DEED—Husband and Wife.—By the stringent rule of the common law a conveyance from a husband directly to the wife without the intervention of a trustee is void, but courts of equity refuse to follow in all cases this common-law rule. In equity the object to be accomplished and the considerations upon which such conveyances are made will be considered, and, if found good and meritorious, and free from imposition and fraud, will be sustained.—*Waterman v. Higgins*, Fla., 10 South. Rep. 97.

73. DEED—Riparian Lands.—A conveyance of riparian lands by metes and bounds, which on the river side are substantially coincident with high-water mark, carries, under Code Va. § 1339, all the right of the grantor to the strip lying between high and low water mark.—*McDonald v. Whitehurst*, U. S. C. C. (Va.), 47 Fed. Rep. 757.

74. DESCENT—Distribution—Partition.— In a suit for partition by the children of a deceased person as his heirs under a will leaving his property to his "children" equally, where complainants by their bill and proceedings under it have established the rights of the children of a son of the testator who died before testator made the will, they cannot, by exceptions to the master's report finding such grandchildren entitled to share in the estate, object that they were not so entitled under the will.—*Jeffers v. Jeffers*, Ill., 28 N. E. Rep. 913.

75. DESCENT — Rights of Heirs. — Under Code Civil Proc. Cal. § 1452, an heir at law may maintain an action against one not the executor to recover possession and rents of real estate of which the testator died seised in fee, and which his will directed should be converted into money by his executrix as soon as practicable in her judgment, since such direction does not vest title to the land in the executor.—*Estep v. Armstrong*, Cal., 27 Pac. Rep. 1091.

76. DESCENT OF HOMESTEAD.—Under Act Miss. Nov. 28, 1865, providing that all property exempted thereby shall, on the death of the husband, descend to the widow as the head of the family, during her widowhood, for the use and benefit of herself and children, the children, on the death of their father, become cotenants with their mother in his homestead, and their interest is, during her widowhood, subject to be sold by their guardian under an order of probate court, the same as any other property derived from their father.—*Morton v. McCanless*, Miss., 10 South. Rep. 72.

77. DISTRIBUTION OF ESTATE.—Under Mansf. Dig. Ark. § 151, which provides that no order of distribution of any estate shall be made until notice has been given to the other parties entitled to distributive shares, notice must be given to an infant daughter of a decedent interested in the distribution of his estate.—*Neal v. Robertson*, Ark., 17 S. W. Rep. 587.

78. DIVORCE—Alimony.—A judgment awarding a divorce in favor of a wife by the courts of the State of which she is a resident, while valid as affecting the marital *status* of the wife, does not bind the non-resident husband, who has not appeared in the action, nor been served with process in the State in which the action was brought, as to sums allowed for alimony and costs, since, so far as these are concerned, the suit for divorce is a proceeding *in personam*.—*Rigney v. Rigney*, N. Y., 28 N. E. Rep. 405.

79. DIVORCE— Desertion. — Refusal of sexual intercourse does not constitute desertion, within the meaning of Rev. St. Ill. ch. 40, § 1, providing for divorce when one party has "willfully deserted" the other for the space of two years.—*Fritts v. Fritts*, Ill., 28 N. E. Rep. 1058.

80. DOWER—Abolition by Statute.—The various acts of Washington Territory, abolishing the right of curtesy and dower, and which are now embodied in Code Wash. 1881, § 2414, providing that "no estate is allowed the husband as tenant by the curtesy, upon the death of his wife, nor is any estate in dower allotted to the wife "upon the death of her husband," took away a wife's inchoate right of dower in lands previously alienated by her husband without joining her in the deed.—*Richards v. Bellingham Bay Land Co.*, U. S. C. C. (Wash.), 47 Fed. Rep. 854.

81. EJECTMENT — Parol Gift — Adverse Possession.—Code Miss. 1880, § 1188, providing that "no estate of inheritance or freehold, or for a term of more than one year, in lands or tenements, shall be conveyed from one to another, unless the conveyance be declared by writing, signed and delivered," does not prevent one entering and claiming under a parol gift from acquiring title by adverse possession.—*Davis v. Davis*, Miss., 10 South. Rep. 70.

82. ELECTION—Surviving Candidate.— Where one of two candidates for an elective office dies on election day, the survivor, failing to receive a majority of the votes cast, is not entitled to the office.—*Howes v. Perry*, Ky., 17 S. W. Rep. 578.

83. EMINENT DOMAIN—Procedure.—Statutes conferring the power of condemnation under the right of eminent domain are strictly construed. Every condition prescribed in the grant must be complied with, and the proceedings must be conducted in the manner and with the formalities prescribed in the grant of power. Formalities and modes of procedure prescribed are of the essence of the grant, which the courts cannot disregard on a conception that they are not essential.—*State v. Mayor*, N. J., 22 Atl. Rep. 1052.

84. EQUITY—Jurisdiction.—Where a resident of Iowa delivers a policy of insurance on his property to a resident of New York as collateral security for a loan, but gives no assignment thereof, and after destruction of the property, assigns the policy to a resident of Iowa, the courts of New York, in an equitable action on the policy by the lender against the insurance company, have no authority, after ordering the assignee to be made a party, to render judgment in favor of the lender against the insurance company, and to enjoin the assignee from recovering on the policy, unless said courts have acquired jurisdiction of the assignee.—*Mahr v. Norwich Union Fire Ins. Soc.*, N. Y., 28 N. E. Rep. 391.

85. EQUITY PLEADING — Amendment — Appeal.—An order refusing leave to amend a bill will not be reversed

upon appeal, even though the order was based upon the erroneous theory that the court had no power to allow the amendment, where it appears that the allowance of the amendment, though within the power of the court, would not have been a proper exercise of its discretion.—*Campbell v. Powers*, Ill., 28 N. E. Rep. 1062.

86. EQUITY PRACTICE— Dismissal.—Where no cross-bill has been filed, the complainant may dismiss his bill at any time before final decree.—*Reilly v. Reilly*, Ill., 28 N. E. Rep. 960.

87. EVIDENCE — Admissions. — The admissions contained in a letter are to be scanned with care if they are susceptible of more than one construction, and if, in order to discover their true meaning, attention should be directed to the precise terms employed by the writer.—*Richmond & D. R. Co. v. Kerler*, Ga., 13 S. E. Rep. 833.

88. EXECUTION—Exemptions.—Act Md. 1861, ch. 7, provides that property to the amount of $100 shall be "exempt from execution:" *Held*, that such exemption attaches to the surplus proceeds of a foreclosure sale as against existing judgment creditors.—*Darby v. Rouse*, Md., 22 Atl. Rep. 1110.

89. EXECUTION—Foreclosure of Homestead.—Where a homestead has been sold on foreclosure of a mortgage, in which the estate of homestead is duly released, and the mortgagor does not redeem within the time allowed him by statute for that purpose, a judgment creditor, who afterwards redeems from the foreclosure sale, and buys in the property at execution sale under his judgment, takes title free from the estate of homestead, since the effect of the redemption is to vest the judgment creditor with the title acquired at the foreclosure sale.—*Herdman v. Cooper*, Ill., 28 N. E. Rep. 1094.

90. EXECUTION—Levy.—A levy of *fi. fa.* was void when the officer merely made a schedule of the goods from his own knowledge, and the creditor's description of them, and did not see or take possession of them, or serve the writ upon the judgment debtor.—*Horsey v. Knowles*, Md., 22 Atl. Rep. 1104.

91 EXECUTION—Sale—Resale.—Before a purchaser at execution sale can be compelled to comply with his bid, or be held liable for loss on a second sale, he must be notified of an intended application for such an order, that he may have an opportunity to show cause against it.—*Harbison v. Timmons*, Ill., 28 N. E. Rep. 982.

92. EXECUTION—Setting Aside Sale.—The power of a circuit court to set aside an execution sale on account of fraud is confined to the return term of the execution, after which relief can be had only in a court of equity. —*Hall v. Moore*, Miss., 10 South. Rep. 74.

93. EXECUTION SALE.—A sheriff's deed of land sold on execution after the return-day of the execution under which the levy was made is void.—*Hawes v. Rucker*, Ala., 10 South. Rep. 85.

94. EXECUTORS—Legacies.—Where an executor, who is a residuary legatee, is exempted from giving bond by the will, he is personally liable for a legacy payable out of a farm that was devised to him subject to the lien of said legacy, upon his selling the farm and appropriating the proceeds to his own uses.—*Evans v. Foster*, Wis., 50 N. W. Rep. 410.

95. EXECUTOR'S BOND. — A recital in an executor's bond that, by order of the probate court duly made and entered, the above bounden H was appointed executor," etc., estops the surety to deny that the order appointing the executor was duly made and entered.—*Moore v. Earl*, Cal., 27 Pac. Rep. 1087.

96. EXEMPTIONS — Death of Claimant. — Where the goods of a debtor were levied on under execution, and the debtor gave notice of his intention to claim his exemption, but died before he could do anything further, and his widow, to whom the exemption right passed on his death, gave notice of her claim at the execution sale, she is entitled to recover the goods.—*Thompson v. Ogle*, Ark., 17 S. W. Rep. 593.

97. EXPERT TESTIMONY—Medical Books.—On trial of an action for damage for negligence and unskillfu nes- of a physician in setting plaintiff's broken arm, it is error to permit plaintiff to read to her medical witnesses, in their examination in chief, extracts from a standard work on surgery, and then to ask them if what was so read corresponds with their own judgment. —*Lilley v. Parkinson*, Cal., 27 Pac. Rep. 1091.

98. EXPERT TESTIMONY—Negligence.—A medical expert may form and express an opinion of the nature of the malady or injuries of a sick or injured person, based in part upon the statements and complaints made by the patient, in relation to his condition, sufferings, or symptoms at the time, in the course of a professional examination into his case.—*Johnson v. Northern Pac. R. Co.*, Minn., 50 N. W. Rep. 473.

99. FEDERAL OFFENSE.— An indictment for offering an internal revenue officer a bribe to set fire to a distillery situated within the limits of a State is not cognizable by the federal courts, since there are no common law offenses against the United States; and Rev. St. U. S. § 5451, which makes it a crime to offer to bribe an officer of the United States with intent to influence him to do or omit to do any act in violation of his lawful duty, applies only to acts within the official functions of the officer.—*United States v. Gibson*, U. S. D. C. (Ill.), 47 Fed. Rep. 833.

100. FEDERAL OFFENSE—Obstructing Justice.—Rev. St. U. S. § 5399, providing that every person who by threats or force endeavors to intimidate or impede any witness "in any court of the United States," or by threats or force endeavors to impede the due administration of justice therein. "shall be punished," etc., does not apply to the act of one, who, two months after a prosecution against him before a United States commissioner has been dismissed, beats a person who had appeared therein as a witness against him.—*United States v. Thomas*, U. S. D. C. (Va.), 47 Fed. Rep. 807.

101. FRAUDS, STATUTE OF.—Civil Code Cal. § 1739, provides that no agreement to buy or sell personal property of the value of $200 or more is valid unless the same be in writing. Section 1740 provides that an agreement to manufacture a thing from material furnished by the manufacturer is not within the provisions of the last section: *Held*, that plaintiff's contract to cut and deliver to defendant stone for a building according to certain specifications, though not in writing, was valid.—*Flynn v. Dougherty*, Cal., 27 Pac. Rep. 1080.

102. FRAUDS, STATUTE OF — Homestead.—Where defendant sold by parol for valuable consideration, with his wife's knowledge and consent, a portion of a tract of land that constituted their homestead, and took possession of the same after the grantee had been in continuous, peaceable, and adverse possession for 15 years, there had been a sufficient performance of the contract to take it out of the statute of frauds.—*Roemer v. Meyer*, Tex., 17 S. W. Rep. 597.

103. FRAUDS, STATUTE OF—Lease — Assignment.—Under Rev. St. Ill. ch. 59, § 2, a landlord cannot sue the assignee of his tenant for rent accruing while the assignee was not in actual possession, where the lease at the time of the assignment had more than a year to run, and the assignment was not in writing.—*Chicago Attachment Co. v. Davis Sewing Machine Co.*, Ill., 28 N. E. Rep. 959.

104. FRAUDULENT CONVEYANCES.—The assignment of a claim to a creditor, under an agreement that any surplus over and above the amount of the debt should be paid by the assignee to another creditor, without reservation for the assignor's benefit, is not void upon the ground that it was made to hinder and delay creditors.—*Perkin sv. Hutchison*, R. I., 22 Atl. Rep. 1111.

105. FRAUDULENT CONVEYANCE—Rescission.—Where a purchaser, knowing himself to be insolvent, obtains goods on credit by falsely representing himself to be solvent, and then transfers the goods to another by means of a fraudulent and pretended sale, the seller may rescind the sale, and recover the goods from the fraudulent vendee.—*Leri v. Kaminer*, Ind., 28 N. E. Rep. 1028.

106. GARNISHMENT — Insurance Money. — An insurer who has elected, under the terms of a policy, to rebuild a building destroyed by fire instead of paying the loss, and who has contracted for its erection, cannot be garnished by a creditor of the insured who has recovered a judgment on a mortgage on the premises executed after they had been insured; and that, although the premises are advertised for sale under the mortgage.—*Stone v. Mut. Fire Ins., Co.*, Md., 22 Atl. Rep. 1051.

107. GARNISHMENT— Res Adjudicata.—Where wages are garnished, and garnishee, in discharge of a judgment against him rendered by a justice's court pays the money to the constable, and afterwards the laborer claims the fund as exempt, and such claim is adjudicated against him in the justice's court he cannot maintain a rule against the constable in the superior court for the money, founded on his exemption right.—*La Motte v. Harper*, Ga., 13 S. E. Rep. 804.

108. HABEAS CORPUS—Writ of Error.—Error does not lie to review the action of a circuit court commissioner discharging a prisoner on *habeas corpus*.—*State v. Brownell*, Wis., 50 N. W. Rep. 413.

109. HIGHWAY — Dedication. — The owner of land, bounded by a section line along, which people had been accustomed to travel, fenced in the tract so as to leave outside the fence a strip of 33 feet wide along said line: *Held*, that such act constituted a common law dedication of the strip as a highway.—*Moffet v. South Park Commissioners*, Ill., 28 N. E. Rep. 975.

110. HIGHWAY—Public Nuisance.—On a trial for maintaining a public nuisance by obstructing a highway, defendant cannot show that the actually traveled road does not conform to the plan of the road as established by the viewers, if it appears that the road as traveled was laid out by the supervisor.—*Commonwealth v. Dicken*, Penn., 22 Atl. Rep. 1043.

111. HOMESTEAD — Residence.— Defendants, husband and wife, were living in S until August 21, 1883, when they and their children left the city with part of their furniture, and went to the homestead claimed, where they stayed that night. The following morning the husband returned to S, and telegraphed his wife to meet him at O, which she did, and there had executed and recorded a declaration of homestead, when she returned to the alleged homestead. The day following the wife returned with her children to her husband at S, where they all remained: *Held*, that there was no actual residence on the land within the homestead law.—*Tromans v. Mahlman*, Cal., 27 Pac. Rep. 1094.

112. HUSBAND AND WIFE.—Where a husband conveys property to his wife on the sole consideration of her promise to reconvey to him on request, such promise is valid in equity, under the laws of Connecticut, for it is made for the benefit of herself and her estate, even though the land to be reconveyed is not held as her separate estate.—*Hausman v. Burnham*, Conn., 22 Atl. Rep. 1065.

113. INJUNCTION — Contracts — Restraint of Trade.— Where a party to a contract, which stipulates the damages for its breach, practices medicine in a certain locality, contrary to the terms of the contract, the party injured has an adequate legal remedy by an action for the stipulated damages, and an injunction to restrain the breach will not lie.—*Martin v. Murphy*, Ind., 28 N. E. Rep. 1118.

114. INJUNCTION—State Officers.—A private citizen and tax-payer cannot sue to enjoin a State officer from misappropriating the public funds, but the relief must be sought by the attorney general, under Laws Wash. 1887-88, ch. 7, § 6, subd. 8, p. 7, making it his duty "to enforce the proper application of funds appropriated to the public institutions of the territory."—*Jones v. Reed*, Wash., 27 Pac. Rep. 1067.

115. INSURANCE—Complaint.—A complaint in an action on an insurance policy, which does not set out the policy, or show either proof of loss, ownership, or value, but only states that the insured was damaged in a certain sum, and that he gave the company notice of the fire, is demurrable.—*Emigh v. State Ins. Co.*, Wash., 27 Pac. Rep. 1063.

116 INSURANCE—Contribution.—Where one is insured concurrently in seven companies, and makes claim for his whole loss against six of the companies, and the whole loss is thus settled, conformably to the terms of the policies, and paid, the seventh company is discharged as to him, and its liability, if any, is to the other companies for contribution.—*Williamsburg City Fire Ins. Co. v. Gwinn*, Ga., 13 S. E. Rep. 837.

117. INTOXICATING LIQUORS.—Separate counts, charging defendants with maintaining a liquor nuisance and making single illegal sales, may be joined in one indictment; the offenses, mode of trial and punishment being of the same general nature.—*Commonwealth v. Galligan*, Mass., 28 N. E. Rep. 1129.

118. INTOXICATING LIQUORS — Collection of Liquor License.—A revenue agent is not authorized to proceed against one violating the law until the sheriff, knowing of the violation, neglected or refused to collect the tax.—*State v. Thibedeaux*, Miss., 10 South. Rep. 58.

119. INTOXICATING LIQUORS — Evidence.— Witnesses testifying to the sale of "beer" at a drinking saloon where intoxicating liquors are sold may be understood as meaning the fermented malt beer in common use as a beverage.—*State v. Dick*, Minn., 50 N. W. Rep. 362.

120. INTOXICATING LIQUORS — Unlawful Sales.—In an action to recover the price of ale sold to defendant in New Hampshire, the burden of proof is on defendant to show that the sales were illegal, because in conflict with Gen. Laws N. H. ch. 109, declaring sales of intoxicating liquors to be unlawful only in towns that had passed a vote to that effect.—*Portsmouth Brewing Co. v. Smith*, Mass., 28 N. E. Rep. 1130.

121. JUDGMENT.—If not in all cases whatsoever, certainly in any case admitting of doubt, the question of rendering a judgment by the superior court without a jury is one not involving jurisdiction, but the proper exercise of jurisdiction, and the improper decision of it is mere error, and will not render the judgment void.—*Georgia Railroad & Banking Co. v. Pendleton*, Ga., 13 S. E. Rep. 822.

122. JUDGMENT—Collateral Attack.—In a suit for the possession of land, the demandant cannot impeach a judgment entered against him, by agreement, in a former action brought by the tenants' grantor to try the same title, by showing that his attorney, whose employment as such was not denied, acted against his express direction in agreeing to the entry of the judgment.—*Young v. Watson*, Mass., 28 N. E. Rep. 1135.

123. JUDGMENT IN PARTITION—Collateral Attack.—The validity of a partition proceeding, in which the court affirmed a report of the commissioners laying out a road and giving abutting lot-owners a right of way over the same, without platting or partitioning the land occupied by it, cannot be collaterally attacked on the ground that the court had no power to lay out or establish a road, or that the commissioners were not authorized to do so.—*Turpin v. Dennis*, Ill., 28 N. E. Rep. 1065.

124. LANDLORD AND TENANT—Dangerous Premises.—A landlord who owns adjacent buildings, and undertakes for a consideration to transmit power from one to the other for the use of tenants in the latter, is bound to exercise reasonable care that the pulleys and shafts are in a safe condition; and if he is negligent in that regard, and an employee of one of the tenants, herself in the exercise of due care, is injured by the fall of a shaft, she is entitled to recover of the landlord; and the latter cannot excuse himself by showing that by the terms of the lease the tenant was bound to keep the said shaft in repair.—*Poor v. Sears*, Mass., 28 N. E. Rep. 1046.

125. LANDLORD AND TENANT—Forcible Entry and Detainer.—Under Hill's Code Oreg. §§ 3509 and 3510, a lessor may maintain such action against a lessee who refuses to pay rent or deliver possession for ten days after demand, without proving that he actually holds posses-

sion by force.—*Hislop v. Moldenhauer*, Oreg., 27 Pac. Rep 1052.

126. LANDLORD AND TENANT — Unlawful Detainer.—Under Code Civil Proc. Cal. § 384, which provides that any number less than all of the tenants in common may jointly or severally prosecute or defend any action for the enforcement or protection of their rights, one cotenant can maintain an action of unlawful detainer.—*Lee Chuck v. Quan Wo Chong*, Cal., 28 Pac. Rep. 45.

127. LANDLORD AND TENANT—Use and Occupation.—An action for use and occupation cannot be maintained except where the relation of landlord and tenant has existed between the parties. Unless there has been an agreement, express or implied, from which an obligation to pay for the use of the premises can be inferred, some other remedy than an action for rent or for use and occupation must be resorted to.—*Hennessey v. Hoag*, Colo., 27 Pac. Rep. 1061.

128. LANDLORD'S LIEN ON CROP.—Where a landlord's agent, not content with the statutory lien for supplies, takes, in his own name, a trust deed on a crop to be raised by the tenant on the leased premises as security for supplies to be furnished, the landlord, as against third persons, must confine himself to the security afforded by the deed of trust, and cannot recover from a purchaser in good faith the value of crops sold to him and raised by subtenants.—*Gaines v. Keeton*, Miss., 10 South. Rep. 71.

129. LEASE.—A written lease not under seal, for a term of one year, may be canceled by a parol agreement to the lessor to release the lessee, and accept another tenant in his stead, followed by a surrender of possession by the lessee to such other tenant.—*Donahoe v. Rich*, Ind., 28 N. E. Rep. 1001.

130. LIBEL—Complaint.—In an action for libel a complaint alleging the willful and intentional sale by defendant of a paper containing the libelous article is sufficient, and need not allege that defendant knew that the paper contained such article, as the absence of such knowledge is matter of defense.—*Street v. Johnson*, Wis., 50 N. W. Rep. 395.

131. LICENSE ON LAND.— Where plaintiffs, under a parol agreement, are allowed to construct a tile-drain over a portion of defendant's land, and connect with a ditch there, the license is executed, and cannot be revoked at defendant's will if plaintiffs have always been ready to perform their part of the agreement.—*Saucer v. Keller*, Ind., 28 N. E. Rep. 1117.

132. LIFE INSURANCE—Pleading.—A declaration on an insurance policy which provides that the beneficiary shall receive the sum represented by the payment of $2 by each member in Division A of the association, not exceeding $5,000, which does not aver the number of members in such division, is defective on a general demurrer.—*Mutual Acc. Ass'n v. Tuggle*, Ill., 28 N. E. Rep. 1067.

133. LIMITATIONS—Insurance.—A 12-months' limitation in a policy of fire insurance, within which the assured must sue for a loss, is not waived by conduct of the insurance company calculated to make the former believe that the loss will be paid, provided such conduct ceases, so as to leave a reasonable time within which to sue; and 7 months of the 12 is considered ample time.—*Steel v. Phenix Ins. Co. of Brooklyn*, U. S. C. C. (Oreg.), 47 Fed. Rep. 863.

134. LIMITATIONS — County Orders.— Under Gen. St. Colo. 1883, § 637, providing that county orders shall be paid in the order of their presentation to the county treasurer, the holder of such orders has no cause of action such as will set the statute of limitations to running until the orders are presented.—*Schloss v. Board of County Commissioners*, Colo., 28 Pac. Rep. 18.

135. LIMITATIONS—Foreclosure of Mortgage.—A mortgage cannot be foreclosed after an action at law on the mortgage debt is barred by the statute of limitations.—*Harding v. Durand*, Ill., 28 N. E. Rep. 948.

136. LIMITATIONS—Payment of Interest—Negotiable Instrument.—Where a wife in Oregon mortgages her separate property to secure a note given by her husband alone, and thereby, under the law of that State, becomes his surety in respect to the mortgaged lands, though not bound personally, and then dies before the debt matures, subsequent payments of interest by the husband before the statute of limitations has run against the note will keep the debt alive as to the surety.—*Cross v. Allen*, U. S. S. C., 12 S. C. Rep. 67.

137. MALICIOUS PROSECUTION—Acquittal of Plaintiff.—A justice, in a prosecution that he had no jurisdiction to try, instead of holding the accused for the grand jury, decided that, although no wrong was "intended," the act was "wrong and unlawful," and discharged the prisoner upon his paying one dollar fine and costs, and "expressing regret for what he had done, declaring that he intended no wrong, and asking for mercy:" *Held*, in an action for malicious prosecution, that the jury should have been instructed that, because of the want of evidence that plaintiff was acquitted, their verdict should be for defendant.—*Hergenrather v. Spielman*, Md., 22 Atl. Rep. 1106.

138. MANDAMUS TO COURTS.—*Held*, that where a superior court has erroneously dismissed a cause for want of jurisdiction, the proper remedy is by *mandamus* to compel such court to set aside the dismissal, and hear the cause upon its merits.—*State v. Hunter*, Wash., 27 Pac. Rep. 1076.

139. MARRIAGE— Evidence. — Cohabitation, following an illegal marriage, and continued after the obstacle to a legal marriage is removed, does not of itself prove a legal marriage.—*Collins v. Voorhees*, N. J., 23 Atl. Rep. 1054.

140. MARRIAGE BETWEEN SLAVES—Legitimacy of Issue.—Neither Acts Miss. 1865, ch. 4, nor Const. Miss. 1869, art. 12, § 22, did not validate marriage between persons, one of whom was dead at the time the act was approved, nor render the children of such persons legitimate.—*Andrews v. Simmons*, Miss., 10 South. Rep. 65.

141. MARRIED WOMAN—Note and Mortgage.—Where a married woman buys real property, gives a note, and, jointly with her husband, executes a mortgage for the purchase money and the conveyance is made to her as sole grantee, she receives a consideration for her contract, and is liable as principal, though the property was not purchased for herself alone, but for herself and husband.—*Kedy v. Kramer*, Ind., 28 N. E. Rep. 1121.

142. MASTER AND SERVANT—Negligence.—Under Code Ala. § 2590, subd. 1, which makes a master liable for an injury to a servant occasioned by defective machinery, provided that such defect arose from or was not discovered by reason of the master's negligence, a complaint which alleges that plaintiff's injury was occasioned by a defect which was "known" to the defendant, or which could have been known by the exercise of reasonable diligence, is not sufficient, in the absence of any further allegation of negligence, for the reason that the defendant, after discovering the defect, must have had a reasonable time to remedy it before it could be said to be negligent.—*Seaboard Manuf'g Co. v. Woodson*, Ala., 10 South. Rep. 87.

143. MASTER AND SERVANT—Negligence of Vice-Principal.—Plaintiff's decedent was unskilled in the work being performed for defendant with others like him, with D, a master mechanic, as foreman. Before the work was completed D went away, leaving J, an unskilled laborer, in charge. By reason of the unsuitable tools and appliances used by J, plaintiff's decedent was killed: *Held*, that defendant was liable in damages.—*McElligott v. Randolph*, Conn., 22 Atl. Rep. 1094.

144. MECHANICS' LIENS—Variance.—In an action to enforce a mechanic's lien, the contract alleged was to furnish materials and erect a certain building on defendant's land, while the proofs showed that the work done was to raise up, move back, and repair two houses: *Held*, that plaintiff could not recover.—*Eaton v. Malatesta*, Cal., 28 Pac. Rep. 54.

145. MECHANICS' LIENS— Wife's Separate Property.—One furnishing materials under a contract with the

the husband, made with the wife's knowledge and consent, for the erection of buildings reasonably necessary for the improvement of her separate estate, is entitled to a lien thereon for such materials, though the wife was not a party to the contract.—*Bevan v. Thackara*, Penn., 22 Atl. Rep. 873.

146. MORTGAGE.—Under St. Mass. 1882, ch. 237, authorizing a decree discharging a mortgage after 20 years from the time set for the full performance of its conditions, where no payment or other acknowledgment of the debt has been made in the meantime, the fact that some of the persons interested are non-residents, and have not had personal service, does not affect petitioners' right to relief, since the proceeding is *in rem*.—*Short v. Caldwell*, Mass., 28 N. E. Rep. 1124.

147. MORTGAGE—Deed to Mortgagee.—Where a party deeded his property to another who held a mortgage upon it, nearly equal to its value, to avoid the expense of foreclosure, and the latter made his written promise that if he should sell the same for a greater sum than his debt and expense he would pay the former all sums of money in excess of the same: *Held*, that the transaction was not a mortgage with power of sale, and the defendant a trustee, but that he was liable on his promise in an action at law or for money had and received, when there was such surplus arising from the sale in his hands.—*Duclos v. Walton*, Oreg., 28 Pac. Rep. 1.

148. MORTGAGE—Foreclosure—Crops.—The holder of a certificate of sale of land upon foreclosure has no interest by virtue of such certificate in the crop raised and harvested on the land during the year of redemption.—*Second Nat. Bank of Grand Forks v. Swan*, N. Dak., 50 N. W. Rep. 357.

149. MORTGAGE—Foreclosure—Redemption.—Under a valid statutory foreclosure of a mortgage the time of redemption cannot be extended to await the determination of a suit by a second mortgagee for an accounting for use or rent of the premises had or received by the first mortgagee pending the time of redemption.—*Hoover v. Johnson*, Minn., 50 N. W. Rep. 475.

150. MORTGAGE — Growing Crops. — Where plaintiff took a mortgage on growing crops, knowing that defendants held a prior mortgage thereon, but without knowledge that such mortgage was defective for want of the prescribed certificate, plaintiff is not a subsequent incumbrancer in good faith, and defendants' mortgage is valid as against plaintiff.—*Harms v. Silva*, Cal., 27 Pac. Rep. 1088.

151. MORTGAGE—Lien—Growing Trees.—A contract by which the grantor was to cut bark from trees on the land at the expense of the mortgagee, who agreed to sell it, and apply the proceeds in paying the expenses and the debt secured by the deed, the balance to go to the grantor, is not sufficient to create a lien on the bark, after it has been severed from the trees, in favor of the grantee and against a purchaser from the grantee for value without notice.—*Moisant v. McPhee*, Cal., 28 Pac. Rep. 46.

152. MORTGAGE— Payment—Burden of Proof.—When payment is pleaded as a defense, the burden is upon the party asserting such facts to establish it by a preponderance of the evidence.—*Curtis v. Perry*, Neb., 50 N. W. Rep. 426.

153. MORTGAGE—Settlement.—One who has accepted conveyances of certain lands in settlement of a prior indebtedness cannot afterwards set up a repudiation of the settlement on the ground of fraud, when it appears that, subsequent to the alleged repudiation, he made conveyance of part of the lands, and that he is still in possession and collecting rents from the remainder.—*McLean v. Clapp*, U. S. S. C., 12 S. C. Rep. 29.

154. MUNICIPAL CORPORATIONS— Fines.— Where persons are committed to jail on non-payment of fines and costs for violation of city ordinances, and work out such fines and costs on the streets under an ordinance providing that they shall be credited thereon a certain amount for each day's work, the city does not thereby become liable to officers having costs in the cases in which such persons were tried.—*Fosselman v. City of Springfield*, Ill., 28 N. E. Rep. 916.

155. MUNICIPAL CORPORATIONS— Annexation.—Where a village lying within the limits of an incorporated town is annexed to an adjacent city, whose limits are coterminous with those of another town, such annexation does not cause the village territory to become part of the latter town.—*City of East St. Louis v. Rhein*, Ill., 28 N. E. Rep. 1089.

156. MUNICIPAL CORPORATIONS—Assessments.—Under Acts 22d Gen. Assem. Iowa, ch. 44, a city council may cure the defect in a paving contract caused by their failing to determine the kind and quantity of material to be used before advertising for bids by passing an ordinance ratifying the previous proceedings, reassessing the cost of the paving, and issuing new certificates therefor.—*Tuttle v. Polk*, Iowa, 0 N. W. Rep. 38.

157. MUNICIPAL CORPORATIONS—Defective Drainage.—The owner of city property which is damaged by reason of defects in a ditch established by decree of court, upon petition of a property holder, and not controlled by the city, has no right of action against the city therefor.—*Town of Monticello v. Fox*, Ind., 28 N. E. Rep. 1025.

158. MUNICIPAL CORPORATIONS— Eminent Domain.—A city council has no power to condemn land for a street for the express purpose of giving a railroad company the use of the street in such a manner as to exclude all other travel therefrom.—*Ligare v. City of Chicago*, Ill., 28 N. E. Rep. 934.

159. MUNICIPAL CORPORATIONS—Grading Streets.—Under Rev. St. Ind. 1881, § 3073, which provides that, when a city has established the grade of a street, such grade shall not be changed until the damages occasioned thereby shall have been assessed and tendered to the parties injured, the owner of a lot abutting on a street whose grade has been changed by the action of the United States, with the permission of the city council, has a right of action against the city for the damage to his lot by such change of grade.—*City of Jeffersonville v. Myers*, Ind., 28 N. E. Rep. 999.

160. MUNICIPAL CORPORATIONS—License—Selling Goods by Sample.—A municipal ordinance, requiring "all persons canvassing or soliciting within said city orders for goods, books, paintings, wares, or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited," to take out a license, excepting "persons selling by sample to manufacturers or licensed merchants or dealers residing or doing business in said city," is a valid exercise of the police power.—*City of Titusville v. Brennan*, Penn., 22 Atl. Rep. 893.

161. MUNICIPAL CORPORATIONS—Negligence of Fire Department.—A city is not liable for the negligent driving of a member of its fire department in going to a fire, though the department be under its direct control, management, and operation, and the members of it be employed and paid by the city.—*Alexander v. City of Vicksburg*, Miss., 10 South. Rep. 62.

162. MUNICIPAL CORPORATIONS—Ordinance—Pool-selling.—Under Const. Cal. art. 11, §§ 7, 11, authorizing the city and county of San Francisco to make and enforce within its limits such police regulations as are not in conflict with general laws, an order prohibiting the sale of pools, etc., on horse races, "except within the inclosure of a race track where such trial or contest is to take place," is valid, since though its incidental effect may be to confer special privileges on the owners of race tracks, its purpose is to restrain gambling of the character mentioned, which is a proper subject of police regulation.—*Ex parte Tuttle*, Cal., 27 Pac. Rep. 933.

163. MUNICIPAL CORPORATIONS—Police Commissioners.—A city charter provided that the appointment of policemen should reside in a board of police commissioners, consisting of the mayor and four other members, the former of whom should preside and have only a casting vote. An act of the board required the con-

currence of three members in any resolution. At a meeting at which all the members were present, two voted in favor of the election of certain men to fill vacancies in the force, and two refused to vote; whereupon the mayor declared the men elected: *Held*, that the election was valid, since the silence of the members who did not vote was a sufficient concurrence in the vote of the others, and, presuming that they voted in the negative, the mayor's declaration was equivalent to a casting vote.—*Somers v. City of Bridgeport*, Conn., 22 Atl. Rep. 1015.

164. MUNICIPAL CORPORATIONS—Public Improvements.—Under section 5, ch. 7, Charter of St. Paul, as amended by chapter 7, Laws 1887, two or more local improvements may be done under one order, and included in one contract, though both or all the improvements do not benefit the same property, and though the contract be at a gross price for all the improvements.—*State v. District Court*, Minn., 50 N. W. Rep. 476.

165. MUNICIPAL CORPORATIONS—Removal of Officers—Powers of Council.—The city council is primarily a legislative and administrative body, but it may now be clothed with at least *quasi* judicial authority in connection with removals from municipal offices.—*Carter v. City Council*, Colo., 27 Pac. Rep. 1057.

166. MUNICIPAL CORPORATIONS—Special Assessments.—Act Ill. June 22, 1885, which empowers the corporate authorities of cities and villages to construct and maintain drains, ditches, levees, dykes and pumping works for drainage purposes by means of special assessments, is constitutional, being authorized by Const. Ill. art 4, § 31, as amended in 1878, which authorizes the general assembly to provide for the organization of drainage districts, and vests the corporate authorities thereof with power to construct and maintain levees, ditches and drains by special assessments.—*McChesney v. Village of Hyde Park*, Ill., 28 N. E. Rep. 1102.

167. MUNICIPAL IMPROVEMENTS—Cemeteries—Exemption.—The object of defendant cemetery association was to plat and ornament a certain piece of ground, to be used for a burial-place, and it was provided in the act authorizing its incorporation that it "shall be exempt from taxation and execution:" *Held*, that the property was subject to special assessment for local improvements, and the county court may order a sale for the delinquent special tax.—*Bloomington Cemetery Ass'n v. People*, Ill., 28 N. E. Rep. 1076.

168. MUNICIPAL ORDINANCES—Nuisances.—A municipal ordinance which prohibits the storing of hides within the city without permission from the city council, and provides that such permit shall not be construed into a license to cause a nuisance, is not authorized by Gen. St. Colo. § 3312, subds. 45, 53, which confer on municipalities authority to declare what shall be a nuisance, and to abate the same, and to prohibit any offensive or unwholesome business within the corporation.—*May v. People*, Colo., 27 Pac. Rep. 1010.

169. NEGLIGENCE—Evidence.—In an action for damages for injuries caused by the fall of a span of a bridge it is error to admit evidence that after the fall defendant board of commissioners examined the span which remained standing, and declared it "unsafe, and entirely too flimsy a structure on which to trust a heavy load," and directed the building of an entirely new bridge.—*Board of Commissioners of Wabash County v. Pearson*, Ind., 28 N. E. Rep. 1120.

170. NEGLIGENCE—Injury.—In an action to recover for personal injuries alleged to have been caused by the negligence of the defendant, it is not necessary to establish with absolute certainty the connection of cause and effect between the negligent act and the injury. It is sufficient if the evidence furnishes a reasonable basis for satisfying the minds of the jury that the act complained of was the proximate and operating cause.—*Orth v. St. Paul, M. & M. Ry. Co.*, Minn., 50 N. W. Rep. 368.

171. NEGLIGENCE—Injury in Crossing Street.—Plaintiff being deaf, it was his duty to be more careful to keep a lookout for passing vehicles than if his hearing had not been defective.—*Fenneman v. Holden*, Md., 22 Atl. Rep. 1049.

182. NEGLIGENCE — Injuries in Store.—Whether the fact that a woman, who goes into a store, keeps her eyes fixed on articles in the show-case, which she desires to purchase, rather than the floor, by reason of which she fails to see an open register hole, into which she falls, is negligence, is a question of fact for the jury.—*Hendricken v. Meadows*, Mass., 28 N. E. Rep. 1054.

173. NEGLIGENCE—Licensee.—Where defendant passively allows plaintiff, not a passenger, to pass at her pleasure across its station grounds and platforms, plaintiff is not a trespasser. Where plaintiff in such case is injured by falling through a trap door after dark, and the door is not a concealed peril, designedly laid, defendant is not liable to plaintiff therefor, she being a mere licensee.—*Redigan v. Boston & M. R. Co.*, Mass., 28 N. E. Rep. 1133.

174. NEGLIGENCE — Pleading.—The complaint, in an action against a gas company for damages caused by an explosion of gas, alleged that plaintiff was the owner of a dwelling-house in M, and that defendant so negligently laid its pipes in the streets of M that the gas escaped therefrom into plaintiff's house, and exploded, setting fire to the house: *Held*, that the complaint showed that defendant owed plaintiff a duty, of which its negligence would be a breach, since the averment that defendant laid its pipes in the streets of M showed that defendant owed it to the property owners of M to use reasonable care.—*Mississinewa Min. Co. v. Patton*, Ind., 28 N. E. Rep. 1114.

175. NEGLIGENCE — Verdict.—In an action for negligence in maintaining a railroad embankment which caused plaintiff's land to be overflowed, a judgment for the plaintiff will not be reversed for the jury's omission to answer the interrogatory, "Was the plaintiff's damage the direct result of an extraordinary rain-fall?" since the interrogatory is immaterial because of its omission of the qualification that the rain fall was so great or extraordinary that it could not have been reasonably anticipated.—*Ohio & M. Ry. Co. v. Ramey*, Ill., 28 N. E. Rep. 1087.

176. NEGLIGENCE OF CONTRACTOR.— Where a street-railway company, having authority under its charter to construct a railway in the public street, does the work by an independent contractor, and an injury to a person passing along the street is caused by the negligence of a servant of the contractor, the contractor is liable for the consequences of such negligence, but the railway company is not, the latter company not having reserved any control over the conduct of the former in executing the work.—*Fulton County St. R. Co. v. McConnell*, Ga., 13 S. E. Rep. 828.

177. NEGOTIABLE INSTRUMENT—Assignment to Maker's Wife.—Where a note is given to a third person for money advanced to the maker by his wife it is valid in its inception, and an assignment to the wife does not nullify it; and, after the death of the husband, the wife, as administratrix, may maintain an action for license to sell real estate to raise money for its payment.—*Spooner v. Spooner*, Mass., 28 N. E. Rep. 1121.

178. NEGOTIABLE INSTRUMENT—Consideration.—A note payable to a missionary society, which recites that the maker is "desiring to advance the cause of missions, and to induce others to contribute to that purpose," shows that it is given upon sufficient consideration.—*Garrigus v. Home, etc. Missionary Soc.*, Ind., 28 N. E. Rep. 1009.

179. NEGOTIABLE INSTRUMENT—Extension.—Under the provision of a note that, at its maturity, the maker should have the privilege of extending the time of its payment, by giving the holder written notice of his intention, the giving of the notice at time is essential to the right of extension.—*Houston v. Newsome*, Tex., 17 S. W. Rep. 603.

180. NEGOTIABLE INSTRUMENT — Interest.—An agreement in a note to pay interest on arrears of interest is

iniquitous and invalid.—*Levens v. Briggs*, Oreg., 28 Pac Rep. 15.

181. NEGOTIABLE INSTRUMENT—Liabilities of Indorser.—In an action against an indorser of a note, where demand of payment was not made at its maturity, the plaintiff must show that defendant, having knowledge that she was discharged of all liability, had renewed her liability by payments or subsequent promises to pay.—*Parks v. Smith*, Mass., 28 N. E. Rep. 1044.

182. NEGOTIABLE INSTRUMENT—Will.—A written instrument acknowledging the receipt of money and promising to repay it a certain time after the promisor's death is a contract in the nature of a promissory note, and not an attempted testamentary disposition of property.—*Wolfe v. Wilsey*, Ind., 28 N. E. Rep. 1004.

183. NEW TRIAL.—Upon motion for new trial on the ground of newly discovered evidence, counter affidavits upon the question of diligence may be filed.—*Westbrook v. Aultman, Miller & Co.*, Ind., 28 N. E. Rep. 1011.

184. OFFICERS—Removal—Veterans.—Act N. J. April 9, 1889, which prohibits the removal of any honorably discharged Union soldier or sailor, who served in the late war between the States, from a public office "under the government of any city or county of this State," except for cause, does not apply to the office of clerk of the district court of a city.—*State v. OConnor*, N. J., 22 Atl. Rep. 1091.

185. PARTITION OF SYNDICATE LANDS.—Where the members of a syndicate who are tenants in common of equal undivided interests in a tract of land attempt to effect to subdivision thereof by conveying to each member a specific proportional part, but by reason of defective execution the deeds are insufficient to convey the legal title, and thereafter each member, either by conveyances to third parties, or by other acts, asserts title to the part described by his deed, by reason whereof, and of subsequent subdivisions, grants, descents, and frauds, the title becomes much involved, equity will decree a partition, giving to each member the part so claimed by him, and confirming to his grantees thereof, and their representatives, such parts as they have purchased from him.—*McDonald v. Donaldson*, U. S. C. C. (Wash.), 47 Fed. Rep. 765.

186. PARTNERSHIP—Accounting.—In an action for an accounting between partners, when the answer alleges a prior dissolution, the *onus* is on defendant to show a clear and complete abandonment of the partnership and a settlement.—*Marabitti v. Bagolan*, Oreg., 28 Pac. Rep. 10

187. PARTNERSHIP—Application of Assets.—A partner made a will, which, after providing for the payment of all the testator's debts, gave the entire residue of the property to his copartner. The will contained no provision authorizing the continuance of the business after the testator's death, nor any express waiver of the testator's right to have the partnership effects applied to the payment of the partnership debts: *Held*, not a waiver of the said right.—*Goldsmith v. Eichold*, Ala., 10 South. Rep. 80.

188. PLEADING.—A plea which alleges no special damage is to be construed as one which claims general damages only; and where such a plea is improperly stricken, but the defendant is nevertheless allowed the benefit of it on the trial, the error of striking it is not cause for the new trial.—*Atlanta Glass Co. v. Noizet*, Ga., 13 S. E. Rep. 833.

189. PLEADING—Amendment.—As a declaration must contain all the substance requisite to enable the plaintiff to recover, no amendment of its form would be of any value without a complete cause of action in substance. Hence, in order for a declaration to be amendable in form, a substantial cause of action must appear; otherwise there is not enough to amend by.—*Ellison v. Ga. Railroad & Banking Co.*, Ga., 13 S. E. Rep. 809.

190. PLEDGE—Landlord and Tenant—Fixtures.—A paper-mill, standing on stone foundations on leased ground, and erected by the lessee, and the paper machines and boilers attached to and forming part of the mill, are realty, and will pass under a mortgage of the leasehold estate.—*First Nat. Bank v. Adam*, Ill., 28 N. E. Rep. 955.

191. PRACTICE—Joint Action.—Where defendants in an action to recover money deny that they are both indebted, but one avers in his separate answer that he is indebted as set forth in the complaint, and no misjoinder of defendants is pleaded, it is error for the court to give judgment in favor of both defendants.—*Gruhn v. Stanley*, Cal., 28 Pac. Rep. 56.

192. PRINCIPAL AND AGENT.—A railroad company telephoned to one P to send his tug with a scow to a certain place to remove some hay: *Held*, that P could not bind the company by authorizing another tug-owner to take a tug, hire a scow, and remove the hay, so as to make the company liable for the services of such scow, or damages for injury to her while removing the hay.—*Bleeker v. Satsop R. Co.*, Wash., 27 Pac. Rep. 1073.

193. PRINCIPAL AND AGENT—Equitable Title.—In ejectment defendant claimed an equitable title. Plaintiff's testator, A, formerly owned the land, and placed it with F to sell, who intrusted it, with A's consent, to defendant. In a short time defendant wrote to F that he had an offer, and inclosed a deed for A to sign with the name of the grantee omitted. On return of the deed signed and acknowledged, defendant inserted his name as grantee, and forwarded a check to F for the price, who cashed the check and credited A's account. The deed was void because of the failure to insert the grantee's name before delivery: *Held* that, on account of defendant's fiduciary relation to A, he took no equitable title.—*Burke v. Bours*, Cal., 28 Pac. Rep. 57.

194. PRINCIPAL AND AGENT—Lease Land.—The authority of a person appointed for a single year "to act" as agents for lands, some of which were improved and others valuable only for minerals, "and honestly and diligently to manage" the same did not extend to leasing for a term of 15 years the sole right to quarry, take, and sell ganister stone therefrom.—*Duncan v. Hartman*, Penn., 22 Atl. Rep. 1099.

195. PRINCIPAL AND AGENT—Sale of Goods.—An agent intrusted with the possession of the goods of another for sale, may sell the same to one who has no knowledge of his agency, and receive the purchase money therefor; and in like manner, if he sell in his own name, without disclosing his principal, he may receive the purchase money for the goods sold.—*Du Bois v. Perkins*, Oreg., 27 Pac. Rep. 1044.

196. PRINCIPAL AND SURETY.—Where a person supposed to be solvent, when in fact he is insolvent, secures sureties on his note, which is discounted at the bank of which he is an officer, the sureties cannot resist payment on the ground that the bank knew the principal to be insolvent, for the bank was not bound to disclose that fact, even if known to it.—*Farmers' & Drovers' Nat. Bank v. Braden*, Penn., 22 Atl. Rep. 1044.

197. PRINCIPAL AND SURETY—Bond of City Assessor.—The giving of a new bond by the city assessor, pursuant to Rev. St. Tex. art. 366, does not release the sureties on the bond already existing from liability for defaults of the principal to that date.—*Loyd v. City of Ft. Worth*, Tex., 17 S. W. Rep. 612.

198. PROCESS—Service.—Where there was an original process attached to the declaration which was not copied and served on the defendant, the declaration alone being served, it was competent for the court, on motion of the plaintiff's counsel, to order the original process to be made returnable to the next term of the court, and that a copy be served on the defendant, notwithstanding the defendant had made a motion to dismiss the action.—*Lassiter v. Carroll*, Ga., 13 S. E. Rep. 825.

199. QUIETING TITLE.—Where land, paid for out of a husband's savings since his marriage, was conveyed to his wife "as her separate property and estate," without his

knowledge, and contrary to his intention to take a conveyance to himself and wife, he could not assert his equitable rights in an action to quiet his title against his wife's grantee, founded upon Code Civil Proc. Cal. § 738, which provides that any person may bring an action against another "who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim."—*Shanahan v. Crampton*, Cal., 28 Pac. Rep. 50.

200. QUO WARRANTO—Usurping Public Franchise.—In *quo warranto*, charging defendants with usurping a public franchise to operate a ferry, where they attempted to defend on the ground that they had a legal right to use the ferry, the burden was on them to show a valid title.—*Gunterman v. People*, Ill., 28 N. E. Rep. 1067.

201. RAILROAD COMPANIES—Accidents at Crossings.—Common prudence requires that a person walking across a railroad track at a crossing should look for approaching trains before going upon the track, and his failure to do so, when unexcused by any other fact that the view was obstructed until he came within six feet of the track, is negligence.—*Clark v. Northern Pac. R. Co.*, Minn., 50 N. W. Rep. 365.

202. RAILROAD COMPANIES—Condemnation Proceedings.—Under Code Civil Proc. Colo. § 254, providing that, in proceedings by a railroad company to condemn land for a right of way, the verdict of the jury shall state the amount and value of the benefits to the land arising from the building of the road, it is error for the judge to state to the jury, "In this case there seems to be no evidence of any such benefits," because it takes from their consideration a question whose determination is imposed on them by law.—*Rio Grande S. Ry. Co. v. Knight*, Colo., 28 Pac. Rep. 19.

203. RAILROAD COMPANIES—Flying Switches.—It is negligence *per se* for a railroad company to make a flying switch across the street of a town, along which people are constantly accustomed to travel.—*Alabama & V. R. Co. v. Summers*, Miss., 10 South. Rep. 63.

204. RAILROAD COMPANIES—Incorporation.—Act Mo. Jan. 22, 1857, incorporating a railroad company, declared that "a company is hereby created, called the 'St. Joseph & Iowa Railroad Company,'" and designated the first board of directors, but imposed no conditions precedent: *Held*, that the act was a present grant of corporate powers, and the corporation came into being on acceptance of the charter.—*St. Joseph & I. R. Co. v. Shambaugh*, Mo., 17 S. W. Rep. 581.

205. RAILROAD COMPANIES—Injuries—Defective Appliances.—The mere fact that the car was in defendant's possession for two weeks is not of itself sufficient to charge defendant with notice of the defect, where there is nothing to show that there was anything so unusual in the appearance of the car when it was received by defendant as to call for an extraordinarily careful inspection.—*Chicago, St. L. & P. R. Co. v. Fry*, Ind., 28 N. E. Rep. 989.

206. RAILROAD COMPANIES—Use of Streets.—The grant from the city under which the railroad company claimed is "the right and privilege of using" the street in question "for the use and construction thereon of as many railroad tracks, side tracks, switches, and frogs as may be necessary for the convenience of said company in the transaction of their business, etc.: *Held*, that by such grant the fee of the street remained in the city.—*Chicago, B. & Q. R. Co. v City of Quincy*, Ill., 28 N. E. Rep. 1069.

207. RAILWAYS IN STREETS—Damages—Appeal.—Damages can be recovered for injuries sustained from the existence and operation of a railway, switches, and coal bins in close proximity to one's lot, although they do not occupy the street upon which the lot abuts, nor disturb ingress and egress to and from the same.—*Ft. Worth, etc. R. Co. v. Downie*, Tex., 17 S. W. Rep. 620.

208. RECEIVERS—Appointment.—A receiver for a business coporation will not be appointed upon mere allegations of insolvency, unaccompanied by any charge of fraud, mismanagement, or wasting of assets, where by plaintiff's claim would be imperiled; especially so when plaintiff's affidavits as to insolvency are opposed by other affidavits denying the fact, and alleging that the appointment of a receiver would be injurious to the interests of all parties, including creditors.—*Lawrence Iron Works Co. v. Rockbridge Co.*, U. S. C. C. (Va.), 47 Fed. Rep. 755.

209. REMOVAL OF CAUSES—Attachment.—Inasmuch as by the statute of the United States an application to remove a cause from a State court to the United States circuit court is in time if made "at the time, or at any time before the defendant is required by the laws of the State, or the rule of the State court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff;" and inasmuch as the law of Georgia entitles the defendant to plead at any time before final judgment where the case is one commenced by attachment,—an application made to remove at any time before final judgment is not too late, where the defendant has filed no plea.—*South Pac. Co. v. Stewart*, Ga., 13 S. E. Rep. 824.

210. REMOVAL OF CAUSES—Colorable Assignment.—A petition for the removal of a cause alleged that the plaintiff, a citizen of the same State with defendant, was only a nominal party; that the claims sued on belonged to a corporation of another State, which assigned them to plaintiff by an instrument requiring him to collect them, and hold the proceeds "in trust for the use and benefit of the parties owning the same:" *Held*, on motion to remand, that while this does not conclusively show that the assignment was merely colorable, yet the cause should be retained, with leave to plaintiff to plead that he was a *bona fide* trustee to sue and collect, and distribute the proceeds to numerous parties equitably entitled to share therein, on proof whereof the cause would be remanded.—*Goodnow v. Litchfield*, U. S. C. C. (Iowa), 47 Fed. Rep. 753.

211. REMOVAL OF CAUSES—Local Prejudice.—When a cause has been removed from a State court to the federal circuit court by an order which recites that, "it appearing to the court from the petitions filed in this cause, and the affidavits thereto attached, that from prejudice or local influence" the petitioners will not "be able to obtain justice" in the State court, the circuit court will not afterwards receive counter-affidavits denying the existence of prejudice, etc., and consider the question of fact anew on a motion to remand.—*Adelbert College of Western Reserve University v. Toledo, W. & W. Ry. Co.*, U. S. C. C. (Ohio), 47 Fed. Rep. 836.

212. SALE—Action for Price.—Where, in an action for the price of goods, defendant seeks to recoup damages for non-delivery of all the goods according to contract, a verdict for such damages will be set aside where defendant fails to show any loss of sales by reason of such non-delivery, or that he had found any demand for the goods.—*Wachsmuth v. Heil*, Colo., 28 Pac. Rep. 17.

213. SALE—Rescission.—Where a bill of sale contains a covenant by the seller to return the price if the purchaser elects to return the property sold, and notifies the seller of his intention so to do, an action for the return of the purchase money cannot be maintained without averment and proof of return of the property.—*Henderson v. Wheaton*, Ill., 28 N. E. Rep. 110[illegible].

214. SALE—Rescission for Fraud.—Where goods are sold on credit, and the buyer mortgages them to a third person without notice to secure a pre existing indebtedness, as well as fresh advances, the mortgagee is entitled to the protection of a *bona fide* purchaser to the full extent of his mortgage; and having taken possession of the goods under the mortgage, and sold them for an amount insufficient to pay the entire indebtedness, a court of law cannot compel the application of the proceeds to the payment of the money last advanced, so as to deprive the mortgagee of his security to that extent for the benefit of the seller.—*Zucker v. Karpels*, Mich., 50 N. W. Rep. 373.

215. SALE — Rescission for Fraud.—Where plaintiff seeks to rescind a purchase of personal property on

the ground of fraud of defendant, he must show that he returned, or offered to return, all the property received on such purchase.—*Becker v. Trickel*, Wis., 50 N. W. Rep. 406.

216. SALE—When Title Passes.—Contracts for the purchase and sale of chattels, if complete and unconditional, and not within the statute of frauds, are sufficient, as between the parties, to vest the property in the purchaser without delivery. When the chattels are clearly designated and appropriated to the contract, are ready for immediate delivery, and the terms of sale, including the price, are explicity given, there is an executed contract, and the title, as between the parties, passes to the purchaser, even without actual payment or delivery.—*Rail v. Little Falls Lumber Co.*, Minn., 50 N. W. Rep. 471.

217. SCHOOL-DISTRICTS-Organization.—Under Act Miss. 1886, §§ 42, 76, which provide that an incorporated town of 750 or more inhabitants may constitute a separate school-district if the town authorities so elect, the levy of a tax to carry on the school beyond the constitutional period of four months in each year is not an act precedent to the organization of such district, but a duty which may be enforced when deemed necessary.—*State v. Hamilton*, Miss., 10 South. Rep. 57.

218. SCHOOLS—County Superintendent.—The county superintendent has no authority, under the public school act, to decide controversies so as to bind the parties. He can merely express an opinion and give advice, after such investigation as seems to him reasonable.—*State v. Albertson*, N. J., 22 Atl. Rep. 1083.

219. SCHOOLS—Dismissal of Teacher.—Under Act May 8, 1854, § 23, giving a board of school directors power to dismiss a teacher for incompetency, negligence, or immorality, the board exercises a *quasi* judicial power; and where it in good faith dismisses a teacher for incompetency she cannot recover her salary for the entire term on the ground that the dismissal was without cause.—*McCrea v. School-Dist. of Pine Tp.*, Penn., 22 Atl. Rep. 1040.

220. SEDUCTION—Presumption of Chastity.—In an instruction to the jury stating that the woman must have yielded to the illicit intercourse by reason of certain promises made and influences brought to bear on her by the man, the court need not add that it must also be proven that she was of previous chaste character, as the presumption is in favor of the woman's virtue.—*Robinson v. Powers*, Ind., 28 N. E. Rep. 1112.

221. SERVICE OF PROCESS.—Under How. St. Mich. § 3066, service may be made, in the case of a foreign mining corporation, upon a resident agent, whose duty it is to act as custodian of the property of the company and inspect the mines, whether he has any other duties conferred upon him.—*Shafer Co. Iron v. Iron Circuit Judge*, Mich., 50 N. W. Rep. 389.

222. SHERIFF—Unlawful Seizure.—A sheriff, who has a writ, fair on its face, authorizing him to sell a certain house in foreclosure of a chattel mortgage, has a right to enter such house and remove therefrom the goods of persons who are not parties to the suit, even though such persons are the owners of the house, and in possession of it.—*Thompson v. State*, Ind., 28 N. E. Rep. 996.

223. SHIPPING—Damages.—The custom, if such it be, of tying up one craft to another on the shores of the Allegheny river, is merely a privilege, and imposes no duty upon the crew of the inner craft to make it secure enough to hold both; and hence where the owner of a flat-boat, in attempting to land by fastening to a barge, breaks the lashings of the latter, and draws it into the current, he is liable for the resulting damages.—*Pope v. Steckworth*, U. S. D. C. (Penn.), 47 Fed. Rep. 830.

224. SLANDER—Injury to Feelings.—Where defendant, though believing his statement to be true, informs plaintiff's employer that plaintiff is his (defendant's) apprentice, when in fact he is not, and for that reason plaintiff is discharged, plaintiff is entitled to damages for injury to his feelings.—*Lombard v. Lennox*, Mass., 28 N. E. Rep. 1125.

225. SPECIFIC PERFORMANCE—Contract.—In an action founded upon a written agreement to convey "Duluth property already agreed upon," *held*, that by the answer an issue was raised as to whether the "property already agreed upon" was certain specified land, as claimed by the plaintiff, or only such interest therein as the defendant had acquired under a contract.—*Sawyer v. Wallace*, Minn., 50 N. W. Rep. 366.

226. SPECIFIC PERFORMANCE—Conveyance of Land.—An instrument defective as a deed will be enforced as a contract only in cases in which a valuable consideration has passed between the parties.—*Tunison v. Bradford*, N. J., 22 Atl. Rep. 1073.

227. SUMMONS BY PUBLICATION — Amendment.—Rev. St. Wis. § 2640, provides that an order of publication shall be based on the complaint, duly verified and filed, and an affidavit, together showing the requisite facts: *Held*, where such complaint and affidavit were filed on September 20th, but the order of publication was dated "Sep. 19," after judgment on default, in the absence of a tender of a defense on the merits, the court may, in its discretion, and amend the date of the order to conform to the facts.—*Voelz v. Voelz*, Wis., 5 N. W. Rep. 398.

228. SURVIVAL OF ACTION.—The general rule in this State is that actions at law do not die with the person; the exceptions are specified by statute.—*Kelley v. Union Pac. Ry. Co.*, Colo., 27 Pac. Rep. 1058.

229. TAXATION—Division of Village—Estoppel.—A village ordinance disconnected part of its lands, whereby they became part of a township. The ordinance was invalid, but the commissioners of highway in such town acted on the ordinance, and improved highways on the land so disconnected, and built a bridge thereon at a cost of $3,000 to the town. For seven years the village exercised no jurisdiction over such land, and expended no money thereon; and the voters residing on such land exercised no rights in the village government: *Held*, that the village was estopped from claiming the right to tax such land.—*People v. Maxton*, Ill., 28 N. E. Rep. 1074.

230. TAXATION—Municipal Assessments.—Rev. St. U. S. § 1924, declaring that "all taxes shall be equal and uniform, and no distinction shall be made in the assessment between different kinds of property," has reference to general taxation only, and was not intended to apply to special assessments for local municipal improvements, and is not violated by Spokane Falls City Charter, § 7, providing that assessments for local improvements shall be levied on real estate only.—*City of Spokane Falls v. Browne*, Wash., 27 Pac. Rep. 1077.

231. TAXATION — Special Assessment—Notice.—Under Rev. St. ch. 24, art. 9, § 28, which requires proof of mailing notices of special assessment to be made by "one or more of the commissioners," the affidavit of a single commissioner is sufficient proof of such mailing, although the affidavit is required to state that the notices have been sent "to the owners, whose premises have been assessed, and whose names and places of business are known to them."—*Evans v. People*, Ill., 28 N. E. Rep. 1111.

232. TAX-DEED — Validity.—Const. Ark. art. 19, § 20, prescribes a form of oath to be taken by all officers before entering on the duties of their respective offices. Mansf. Dig. § 5661, prescribes a special form of oath for assessors: *Held*, that an assessor regularly elected and qualified by taking the oath prescribed by the constitution, though neglecting to take the special statutory oath, is *de facto* assessor, and a tax-deed, based on a sale made for the non-payment of taxes for the year during which such assessor held office, is valid.—*Barton v. Lattourette*, Ark., 17 S. W. Rep. 588.

233. TAX-SALE—Tenants in Common.—Where one of several co-tenants of land sold for the non-payment of taxes buys the land, his purchase amounts to nothing more than the payment of the tax, and gives him no right except to demand the contribution from his co-tenants.—*Cocks v. Simmons*, Ark., 17 S. W. Rep. 594.

234. TAX-TITLE—Notice.—Rev. St. ch. 120, § 216, which requires notice of purchase at tax sale to be served upon the owners of the land purchased, is not complied with, where the land is owned by a woman, by leaving a copy of such notice with her husband.—*Cotes v. Rohrbeck*, Ill., 28 N. E. Rep. 1110.

235. TELEGRAPH COMPANIES—Condemnation.—Under Act Miss. March 16, 1886, § 3, providing that where a telegraph company shall not agree with the owner of land for a right of way over the same, then condemnation may be had, a telegraph company, after making efforts to get a right of way by contract, without receiving any reply to its proposition within a reasonable time, may resort to condemnation proceedings.—*Louisville, N. O. & T. Ry. Co. v. Postal Telegraph Cable Co.*, Miss., 10 South. Rep. 74.

236. TELEGRAPH COMPANIES—Damages.—The party receiving a telegraphic message, the delivery of the same having been negligently delayed by the agents of the company, cannot recover for mental suffering alone when unaccompanied with other injuries.—*Crawson v. Western Union Tel. Co.*, U. S. C. C. (Ark.), 47 Fed. Rep. 544.

237. TOWNS—Repeal by Implication.—Act Ill. June 9, 1887, which provides that "a president of each and every village and incorporated town" shall thereafter be elected annually by the voters of such village or town, applies to all villages and towns in the State.—*McCormick v. People*, Ill., 28 N. E. Rep. 1106.

238. TOWN SUPERVISORS—Liabilities on Bond.—Money was raised by a town for the payment of certain bonds against it, and paid by the supervisor to the county treasurer, who failed to account for the same: *Held*, in an action on the supervisor's bond, that, since no law authorized the payment to the county treasurer, such payment was no defense to the action.—*Purcell v. Town of Bear Creek*, Ill., 28 N. E. Rep. 1085.

239. TRIAL—Competency of Juror.—Where a juror has formed an opinion from reading newspaper reports of the crime, and testifies on his *voir dire* that it will require the evidence of sworn witnesses to alter this opinion, but that he believes he can try the case according to the law and the evidence, he is not disqualified.—*Commonwealth v. McMillan*, Penn., 22 Atl. Rep. 1029.

240. TRIAL — Evidence—Failure to Produce Books.—*Held*, that it was reversible error to instruct the jury that, if defendant has under his control, so that he might have produced them, books or papers which contain material evidence, which he has not produced, "you have a right to presume that such books and papers, if produced in evidence, would be injurious to his case, unless you find that such presumption has been refuted by the other credible evidence in the case."—*Curtier v. Troy Lumber Co.*, Ill., 28 N. E. Rep. 932.

241. TRIAL—Instructions.—Under Rev. St. Ill. 1877, ch. 110, § 54, providing that when the judge "cannot give" instructions he shall mark them "Refused," and that he shall mark "Given" on the margin of such as he "approves," the judge may, on his own motion, refuse all the instructions asked by a party, and substitute for them one of his own, provided that it embodies all the correct and pertinent propositions contained in those rejected.—*City of Chicago v. Moore*, Ill., 28 N. E. Rep. 1071.

242. TRIAL—Negligence.—As a general rule, the question of negligence is a question of fact, and not of law. When the care exercised by the plaintiff at the time of the injury and the negligence of the defendant are of a complex character, depending upon particular circumstances of fact, which require to be compared and weighed to determine the fact of negligence, the case is for the jury, whose province it is to find the facts.—*Anderson v. Northern Pac. Lumber Co.*, Oreg., 28 Pac. Rep. 5.

243. TRIAL — Negligence — Personal Examination of Plaintiff. — It is proper to deny a motion to compel a plaintiff to submit to a personal examination by medical experts, where the only showing in support of the motion is that defendant's attorney advised the plaintiff's attorney that the defendant desired to have the plaintiff's person examined by competent expearts, "for the purpose of ascertaining the extent of the injuries complained of in the plaintiff's declaration," and that plaintiff's attorney refused to allow such examination without an order of court.—*St. Louis Bridge Co. v. Miller*, Ill., 28 N. E. Rep. 1091.

244. TRIAL—Verdict.—Where a verdict is returned for the plaintiff in an action upon contract, the defendant cannot complain that the verdict is not justified by the evidence, because, under the contract, plaintiff should have recovered a larger sum or nothing.—*Ackerman v. Byrant*, Neb., 50 N. W. Rep. 435.

245. TRUSTEE — Purchase of Beneficiary's Estate.—Where railroad property is, by agreement of the bond holders, bought in at foreclosure sale for a small sum by a trustee for their benefit, and is afterwards sold by the trustee to a new company formed by him and one the bondholders, the profits of the sale going to such bondholder, another bondholder, who has, as far as requested, advanced his share of the expenses of the foreclosure sale, can compel the trustee and the first-named bondholder to account to him for his share of the property.—*Cushman v. Bonfield*, Ill., 28 N. E. Rep. 937.

246. TRUSTS—Contract with Attorney.—Where O, owning an equitable interest in an undivided tract of unpatented land, employed an attorney to procure a patent thereto for the person through whom O derived his interest, and agreed to give the attorney a certain portion of the land if he succeeded. Such contract creates an express trust, and, when completed, vests in the attorney an equitable interest in his proportion of the land, and renders O a trustee of the attorney to the extent of such interest.—*Luco v. De Toro*, Cal., 27 Pac. Rep. 1083.

247. TRUSTS—Husband and Wife.—Prior to the adoption of Code Ala., 1857, on the purchase of lands by the husband in his own name with funds of the wife, a resulting trust arose in her favor to the same extent and under the same circumstances, that it would have arisen in favor of any other person furnishing the purchase money.—*Greaves v. Atkinson*, Miss., 10 South. Rep. 73.

248. TRUSTS—Notice to Creditor.—Where a wife, upon the partition of her father's estate, agrees to take a certain tract as her share, and has the title conveyed to her husband under an agreement with him that he is to hold it for her benefit, and she and her husband enter into a recognizance at the time of the partition to pay the other heirs their shares of the value of the tract, and a year afterwards these owelty payments are made out of the wife's inheritance, a resulting trust in the land in favor of the wife will be declared as against a judgment creditor of the husband, who had actual notice of the partition, and the fact that the husband took the title for the benefit of his wife.—*Light v. Zeller*, Penn., 22 Atl. Rep. 1025.

249. UNITED STATES MARSHALS.—United States deputy marshals have full power to use all force necessary in executing process of the federal courts; and when, after having legally arrested a man, and while conveying him to prison, they are met by a company of his friends who, they have reason to believe, intended to effect a rescue, and one of whom seizes their horses' heads, they are justified in immediately pointing their revolvers at him, thus causing him to desist.—*United States v. Fullhart*, U. S. C. C. (Penn.), 47 Fed. Rep. 802.

250. USURY—Commission to Agents.—Where a person agrees with a trust company to procure and forward applications for loans, with the understanding that he shall receive no compensation from it, but is to obtain his renumeration from borrowers, and he thereafter, in communications to the company and others, styles himself as agent for it, he must be so con-

sidered; and under the law in Illinois a payment to him of a comission by the borrower for securing a loan from the company at the highest legal rate makes the transaction usurious.—*Fowler v. Equitable Trust Co.*, U. S. S. C. 12 S. C. Rep. 1.

251. VENDOR AND VENDEE—Contract.—Where one who has a contract by which he can at any time acquire the legal title to land, sells to another who knows of such contract, giving him 10 days to examine the title, and agreeing to refund a part payment if the title does not prove satisfactorily, the failure of the vendor to obtain a conveyance within the ten days, so that he can convey to the vendee, will not entitle the vendee to rescind the contract and recover the money paid, in the absence of any demand on the vendor for a deed, or offer to complete the purchase, or notice of objection to the title. *Anderson v. Strassburger*, Cal., 27 Pac. Rep. 1095.

252. VENDOR AND VENDEE—Mistake.—If one by mistake purchases a strip of land from the other which really belongs to himself, though he acquired actual possession by reason of his purchase, he is not bound to surrender the possession in order to avoid paying the purchase money if the transaction was by mutual mistake, or if it was by mistake of the purchaser and fraud on the part of the vendor.—*Phillips v. O'Neal*, Ga., 13 S. E. Rep. 819.

253. VENDOR AND VENDEE—Verbal Sale of Land.—Under Code Ala. § 1732, making verbal contracts for the sale of land void unless the purchase money, or a portion thereof, be paid, and the purchaser be put in possession by the seller, payment after the giving of possession brings it within the exception.—*Louisville & N. R. Co. v. Philyaw*, Ala., 10 South. Rep. 83.

254. WATER—Damages.—Where a railroad company digs a ditch along its track, and thereby conducts the water collected therein onto low land at a distance from where the ditch commences, it is liable for the damage, whether the water be mere surface water or water diverted from natural water-courses by the construction of the road-bed.—*Illinois Cent. R. Co. v. Miller*, Miss., 10 South. Rep. 61.

255. WATER—Unlawful Fishing.—St. Mass. 1885, ch. 220, § 6, authorizes constables designated by the selectmen of towns to seize the boat with all tackle, furniture and implements belonging thereto, used in shell fishery contrary to law, and directs that the goods so seized shall be forfeited to the city or town where seizure was made. Pub. St. ch. 194, provides for the filing of a libel against goods so seized, stating briefly the cause of seizure, and praying for a decree of forfeiture: *Held*, that the pendency of the libel is a bar to an action by the owner of the property seized for damagas arising from such seizure.—*Williams v. Delano*, Mass., 28 N. E. Rep. 1122.

256. WILL—Construction.—A devise to testator's wife of all his property, to be at her "absolute disposal to sell, convey, transfer, or expend, as she may deem proper, during her life-time, without restraint, * * * and after her death the remainder of my estate unexpended by her I devise as follows," etc., carried the fee of all the property that the widow disposed of during her life; and railroad stock, sold by the widow through her attorney in fact, though the attorney converted the proceeds to his own use, vested a clear title in the purchaser.—*Coates' Ex'r v. Louisville & N. R. Co.*, Ky., 17 S. W. Rep. 564.

257. WILL—Construction.—A limitation over of a bequest, if the first taker "should die before he has any heirs, then," etc., is a limitaton upon a definite failure of issue at or before the death of the first taker, and is good.—*In re Miller's Estate*, Penn., 22 Atl. Rep. 1044.

258. WILL—Construction.—A testator devised all his property to his wife for life, subject to certain payments, with remainder in fee to his son and daughter. In subsequent clauses of the will he devised one tract of land to his wife in fee, and one to each of his children in fee: *Held*, that after the wife had made the specified payments she was entitled to all the testator's property during her life.—*Rickner v. Kessler*, Ill., 28 N. E. Rep. 973.

259. WILL—Construction.—Testator devised all his property to his wife "as her absolute property," vesting her with "all the powers and rights" that he himself possessed, and declared that she should have power to sell, and that the proceeds should be her absolute property. The next clause provided, should she during her life time not consume or use all the property for her proper support, then "I do hereby enjoin and direct her" to make a will, leaving the residue so that it should be divided equally between her brothers and sisters and testator's brothers and sisters: *Held*, that the last clause did not reduce the fee previously given to a life-estate as to the unconsumed residue.—*Good v. Miller*, Penn., 22 Atl. Rep. 1032.

260. WILL—Construction.—Where testator has devised land to be divided among his children, a subsequent direction that in case of the death of either of them without issue, his share shall be divided among the rest, has reference only to a death during the life time of the testator, and an absolute fee vests in those surviving the testator.—*Wright v. Charley*, Ind., 28 N. E. Rep. 706.

261. WILL—Disinheriting Children.—Code Wash. § 1325, providing that, when a testator dies "leaving a child or children * * * not named or provided for" in his will, he shall be deemed to have died intestate as to them, was intended, not to prevent children from being disinherited, but to require that the intention to disinherit them should clearly appear; and hence a will which gives the testator's heirs one dollar each, and the bulk of his property to his wife, makes a valid disposition of his property.—*Boman v. Boman*, U. S. C. C. (Wash.), 47 Fed. Rep. 849.

262. WILLS.—Restraint of Alienation.—A bequest of an estate in trust with one third of the income to testator's wife, one-third to a daughter, and one third to a son, the trustee, which provides that on the death of the wife her one-third shall be divided between the son and daughter; on the death of the daughter her share to go to her children; on the death of the son, one-third to his widow so long as she shall remain unmarried, and two-thirds to his children, but if the widow remarry, the entire share of the son to his children,—creates a valid trust estate so long as the three original legatees live, but is void as to the remainder over after their decease.—*Beers v. Narramore*, Conn., 22 Atl. Rep. 1061.

263. WILL—Testamentary Powers.—A naked power to executors to sell all of testator's real and personal estate, and to distribute the proceeds as directed in the will, does not authorize the executors to maintain an action to recover land of which the the testator died seised.—*Reynolds' Ex'rs v. Boyd*, Ky., 17 S. W. Rep. 572.

264. WITNESS—Impeachment—Evidence at Former Trial.—Where a witness is in court, his testimony taken on a former trial will not be read in evidence, except to impeach him, and then only such part as his attention is called to specifically, and which he is allowed to explain.—*Campbell v. Campbell*, Ill., 28 N. E. Rep. 1080.

265. WITNESS—Impeachment.—Where it is shown that a witness, not a party to the action, has made declarations out of court contrary to his sworn testimony, such previous declarations are admissible as affecting the credibility of the witness, but not as substantive evidence in the case.—*Union Coal Co. v. Edman*, Colo., 27 Pac. Rep. 1060.

266. WITNESS—Husband and Wife.—Plaintiff was allowed by the trial court to testify that in a room in defendant's house, adjoining one occupied by defendant, plaintiff asked his wife, in the presence of their 14 year old daughter, if she would go with him, to which she replied, "No, sir:" *Held*, that this testimony was properly admitted, and that the communication was not privileged.—*Lyon v. Prouty*, Mass., 28 N. E. Rep. 908.